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No. 95-

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

RICHARD L. GIAMPA,

Petitioner,

vs.

GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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QUESTIONS PRESENTED

Is the due process clause violated when an attorney is suspended from the practice of law through a summary disciplinary proceeding premised on summary contempt adjudications held to collaterally estop hearing the merits of whether the underlying facts involved professional misconduct?

Is the equal protection clause violated when an attorney is suspended through such a summary disciplinary proceeding based on a judicial department rule categorizing summary contempt adjudication as a "serious crime," where such a rule is not authorized by statute and does not exist or cause disciplinary charges in other state judicial departments?

Is freedom of speech violated when an attorney is suspended through such a summary disciplinary proceeding based on words spoken in Court in defending a client against criminal charges?

PARTIES

The names of all parties to the proceeding in the court whose judgment is sought to be reviewed appear in the caption of the case.

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RICHARD L. GIAMPA,

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GRIEVANCE COMMITTEE FOR THE
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**PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK STATE COURT OF APPEALS**

OPINIONS BELOW

The order and decision of the New York State Court of Appeals, 1995 N.Y.LEXIS 2708, ___ N.Y.2d ___, ___ N.Y.S.2d ___, appears in the Appendix,

infra, pp. 1a-3a.[1] The opinion and order of the New York State Supreme Court, Appellate Division, Second Department, 211 A.D.2d 212, 628 N.Y.S.2d 323, appears at pp. 4a-18a. The Report of the Special Referee, which is unreported, appears at pp. 19a-55a.

JURISDICTION

The order of the New York State Court of Appeals dismissing petitioner's timely appeal as of right and denying petitioner's timely motion for leave to appeal was entered on June 29, 1995. Accordingly, this certiorari petition is timely filed. This Court's jurisdiction is invoked under 28 U.S.C. §1257 on the

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[1] Subsequent Appendix references cite pages only, e.g., 4a-18a.

grounds that a right is claimed under the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND JUDICIAL RULE INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in relevant part:

> Section 1. .... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 90 of the New York State Judiciary Law, "Admission to and removal from practice by appellate division; character committees," provides in subdivision (4)(d):

> For purposes of this subdivision, the term "serious crime"

> shall mean any criminal offense denominated a felony under the laws of any state, district or territory or of the United States which does not constitute a felony under the laws of this state, and any other crime a necessary element of which, as determined by statutory or common law definition of such crime, includes interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or conspiracy or solicitation of another to commit a serious crime.

New York State Appellate Division, Second Department Rule 691.7, 22 NYCRR 691.7, "Attorneys Convicted of Serious Crimes; Records of Conviction Conclusive Evidence," provides in subdivision (b):

> The term "serious crime" shall include any felony, not resulting in automatic disbarment under the provisions of subdivision (4) of Section 90 of the Judiciary Law, and any lesser crime a necessary element of which, as determined by the statutory or common law

definition of such crime, involves interference with the administration of justice, criminal contempt of court, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, an attempt or a conspiracy or solicitation of another to commit a "serious crime" or a crime involving moral turpitude.

STATEMENT OF THE CASE

Statement of Facts

The significant constitutional issues raised by this case are whether petitioner's due process, equal protection and free speech rights were violated by a summary disciplinary process resulting in his suspension from the practice of law premised primarily upon contempt citations adjudicated summarily in the course of criminal trials.

Words spoken by criminal defense lawyer Richard Giampa in the course of courtroom advocacy over a ten-year period disturbed and offended five different New York State trial judges -- four of whom held him in summary contempt, with one of the four adjudications expunged during trial. The ensuing disciplinary charges, commenced in 1992 and supplemented in 1993, were based on those five courtroom events.

In 1982, petitioner was held in summary contempt during a pre-trial hearing, out of the jury's presence, for stating, after a series of sustained objections to his questioning of an apparently confused witness who was testifying through an interpreter, that the judge was "not interested in getting the truth from the witness." Petitioner subsequently apologized to the judge.

In 1985, petitioner was held in summary contempt in the presence of the jury when, in attempting to avoid a witness's inadvertent disclosure of prejudicial information by obtaining an instruction to the witness regarding the effect of the judge having "sustained" defense counsel's objection, and after the judge said the prosecutor should proceed and that he did not want to hear defense counsel, petitioner stated "You just want to hear the prosecutor." Subsequently petitioner apologized to the judge.

In 1988, in the course of an argument out of the jury's presence concerning a decision issued after a pre-trial hearing to permit the prosecutor to use grand jury testimony of a recanted eyewitness, petitioner stated that the judge was biased, had made up facts, had

made a bogus decision and was prosecuting the case more vigorously than the prosecutor. Petitioner contended that those remarks were made in the good faith belief that they were well founded and necessary to protect his client's rights.

In 1989, petitioner was held in summary contempt when, out of the jury's presence and in response to the judge criticizing the lawyer for being out of control and making "wild and untrue accusations," petitioner responded that it was the judge who had been acting out of control and like a "wild lunatic." Petitioner apologized for using the last two quoted words and the contempt finding was expunged.

In 1992, petitioner was held in summary contempt in the course of a lengthy multi-defendant multi-murder

drug charge trial when, after a series of escalating disputes with the presiding judge over the course of several months, including numerous highly critical and demeaning statements made to and about him by the judge, he asked the judge not to "smirk" at him.[2]

All of the contempt adjudications were "summary", pursuant to New York Judiciary Law §750; and petitioner timely paid the imposed fines. In no case was there any formal charge, notice of

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[2] This matter illustrates the lack of availability of meaningful appellate review of summary contempt adjudication. Appeal sought by Article 78 proceeding in accordance with New York Judiciary Law §755 and CPLR §7801 was dismissed by the Appellate Division, First Department, granting the Attorney General's motion for "failure to state a cause"; and the New York Court of Appeals denied leave to appeal. Giampa v. Snyder, 199 A.D.2d 1094, 605 N.Y.S.2d 802 (1st Dept. 1993); 83 N.Y.2d 761, 640 N.E.2d 147, 616 N.Y.S.2d 479 (1994).

penal disciplinary consequences, counsel, impartial judge or a jury.

The Grievance Committee successfully contended in the disciplinary proceeding that summary contempt adjudications are "serious crime" convictions pursuant to 22 NYCRR 691.7(b) and that the related charges alleging professional misconduct were thereby automatically sustained (pp. 31a-35a, 37a-40a, cf. 51a-54a, 44a-46a; 56a-71a).[3] The Spe-

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[3] The charges allege that respondent was "convicted of a serious crime within the meaning of 22 NYCRR 691.7(b)" as a result of three summary contempt adjudications in 1982, 1985 and 1992 and that the conduct which formed the basis of those adjudications constituted, variously, "conduct prejudicial to the administration of justice in violation of DR 1-102(A)(5)," "conduct that reflects adversely on his fitness to practice law in violation of DR1-102(A)(7) (now DR 1-102[A][8])" and/or "undignified and discourteous conduct which is degrading to a tribunal in violation of DR 7-106(c)(6)" (pp. 22a-25a, 28a-24a, 29a-31a).

(continued...)

cial Referee held that petitioner was collaterally estopped from challenging the disciplinary charges based on the contempt citations. He held that the summary contempt adjudications automatically constituted professional misconduct because they were "serious crimes" pursuant to Appellate Division, Second Department Rule 691.7(b), as had been held by decisions of that Court, and that, as to those charges, he would therefore receive evidence only in mitigation of punishment (Id.).

There were seven hearing sessions. The Grievance Committee presented its

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[3](...continued)

The charges further allege violations of the same disciplinary rules based on the words spoken in the 1988 case and based on the expunged contempt in the 1989 case having been "reiterated" in a post-trial decision reducing assigned counsel's fee request (pp. 25a-28a).

case exclusively on trial transcripts, excerpts from trial transcripts and certain related court records. Mr. Giampa testified extensively and submitted documentary proof as to the circumstances of each case, including emphasis on his professional obligations as he viewed them (particularly in making objections, presenting arguments and making a record for appellate purposes), his understanding of the events, his state of mind, his lack of intention to act discourteously, disruptively, or contemptuously and his having been guided overall by serious concerns that he properly and zealously represent his criminal defense clients. Testimony and evidence were submitted raising material factual issues as to what was actually said and what actually happened in regard to the events that led to the dis-

ciplinary charges.[4] Two attorneys also testified as fact witnesses regarding events in the 1988 and 1992 cases. An

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[4] Two examples are offered to illustrate the serious nature of the conflicts as to the underlying factual issues. In the 1992 case, while the court reporter transcribed petitioner saying, "I am asking you not to smirk at me" and while petitioner and an attorney witness testified that Mr. Giampa did not speak in a loud voice, the judge found him in contempt for supposedly having "shouted" the words "Stop smirking at me" (pp. 97a-104a). In the 1988 case, petitioner's statements (out of the jury's presence) to record the judge's alleged bias and to make related arguments, were supported by various examples from the surrounding circumstances, including (a) the judge's knowledge, months before the trial began, that the only identifying eyewitness had recanted and that both the judge and the district attorney possessed his sworn recantation statement while the defense counsel and his client were not aware of the recantation; and (b) the judge's knowledge that his son, an assistant district attorney in another county, had an interest in the credibility of a principal witness against the defendant being upheld, since that witness was a cooperating witness in various matters in his son's office (pp. 75a-96a).

expert witness testifed as to all incidents -- concerning professional and ethical standards and petitioner's professional obligations as a criminal defense lawyer to advocate and object and make a record despite tensions and conflicts with judges and judicial resistance and disagreements. Petitioner testified as to issues and what was at stake in each case, including the serious charges and the results.[5] While

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[5] In the 1982 case, the defendant, a 13-year-old boy prosecuted as an adult, was acquitted of the major charges, including two counts of attempted murder, with his conviction of lesser charges referred to Juvenile Court.

In the 1985 case, the defendant was acquitted of all charges, including first degree robbery, larceny and weapon possession.

In the 1988 case, the defendant, prosecuted for murder in the second degree and other charges, was acquitted of all counts.

(continued...)

asserting regret as to any acrimony with judges and acknowledging regret, during tense and emotionally frustrating circumstances in hotly contested trials, at his choice of words in some instances, petitioner gave thorough explanations as to his need to speak out when he did and to make a record of his contentions. He urged that if his speech and conduct were considered and evaluated on the merits, the charges of professional conduct would not be sustained.

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[5](...continued)
In the 1989 case, the defendant's conviction for sale of a controlled substance was reversed on appeal because petitioner's application to be relieved as trial counsel (based on conflict with the court) should have been granted. See, People v. Torres, 182 A.D.2d 461, 581 N.Y.S.2d 788, 789 (1st Dept. 1992).

In the 1992 multi-murder/drug case, the defendant's conviction of all charges is currently on appeal through other counsel.

The subsequent report of the Referee and the Court decisions completely disregarded petitioner's evidence; and the charges were automatically sustained based on the existence of the summary contempt adjudications and based on petitioner having made certain statements in court. Thus, the Special Referee, in his report dated May 18, 1994, and amended May 31, 1994, automatically sustained the Grievance Committee's charges except as to the 1989 case where the contempt was expunged (pp. 19a-55a; p. 48a-49a).[6] The May 22, 1995 Order

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[6] The intial report automatically sustained the charges arising from the 1989 case as if petitioner had been held in summary contempt (pp. 37a-38a). The amended report corrected that factual error (there having been no summary contempt adjudication in that case), but sustained the charges as if acknowledgement of the statements made in court automatically constituted an admission of the allegations of resulting profes-

(continued...)

and Opinion of the Appellate Division, Second Department, sustained all charges (essentially treating the expunged contempt as if reinstated); and imposed the sanction of suspension from practice for one year, with the right to reapply after six months (pp. 4a-18a). Petitioner simultaneously and timely filed a notice of appeal and jurisdictional statement in support of an appeal as of right to the New York Court of Appeals, as well as a motion for leave to appeal. The Court of Appeals dismissed the ap-

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[6](...continued)
sional misconduct (pp. 50a-54a). Thus, violating any concept of a full and fair hearing, the Referee ignored extensive evidence (testimony by Petitioner and an attorney who represented the recanted witness in the case, documents, transcripts and expert witness testimony) detailing the reasons for petitioner's denials of these allegations and explaining his speech and conduct.

peal as of right and denied the motion for leave (p. 1a-3a).

Petitioner filed in this Court an Application for Stay which was denied by Justice Ginsburg on June 30, 1995.

Petitioner was suspended from the practice of law as of July 1, 1995.

How the Federal Constitutional Claims Were Raised

Petitioner's Answer to the Grievance Committee's 1992 Petition asserted as an Affirmative Defense that the contempt holdings violated due process and could not be the basis for disciplinary proceedings. Petitioner's Answer to the 1993 Supplemental Petition asserted Affirmative Defenses: the First Amendment of the United States Constitution, as protecting petitioner's statements made in the course of carrying out ethi-

cal obligations as a lawyer; due process of law under the United States Constitution, with specifications of denial of notice, fair hearing, fair opportunity to respond, right to counsel, trial by jury and an impartial judge; that such unconstitutionally obtained adjudications could not, consistent with due process of law, be the basis for a disciplinary proceeding; and that imposition of additional disciplinary penalties based on the summary contempt adjudications would constitute further violation of constitutional due process and an excessive penalty.

During the hearing before the Special Referee the due process claim was particularly emphasized, with the Referee nonetheless upholding the Grievance Committee's contention that Mr. Giampa was collaterally estopped by virtue of

the summary contempt adjudications from contesting the merits of whether the underlying facts constituted professional misconduct; and specifically precluded petitioner from submitting proof in that regard. (PP. 31a-35a, 37a-40a, cf. 51a-54a, 44a-46a; 56a-71a.) The due process, equal protection and freedom of speech federal constitutional claims, regarding all disciplinary charges and the disciplinary proceeding, were extensively stated in the papers submitted to the Appellate Division and the New York Court of Appeals.

The constitutional claims raised below were specified under both federal and state constitutions. They were not mentioned in any way in the Special Referee's Report or in the Appellate Division, Second Department, Opinion and Order. The Court of Appeals, in denying

appeal as of right, stated that "no substantial constitutional question is directly involved" (pp. 1a-3a).

REASONS FOR GRANTING THE WRIT

This case raises important questions, which have not been but should be settled by this Court: whether a lawyer may summarily be subjected to severe professional discipline on the basis of summary contempt adjudications. To allow such adverse consequences without a full and fair disciplinary hearing on the merits, grants judges the unconstitutionally awesome power to strip an attorney of the right to practice whenever courtroom advocacy and conflict results in a summary contempt adjudication.

An attorney is denied due process if summarily disciplined on the basis of

summary contempt adjudications in which the attorney has not been accorded due process protection ordinarily attendant upon criminal adjudication.

The suspension of Richard Giampa from the practice of law as a result of a summary disciplinary proceeding in which summary contempt adjudications were held automatically to constitute "serious crimes" and thus automatically to constitute professional misconduct, violates the due process clause of the United States Constitution. Implicated in the overall denial of due process are petitioner's right to a fair trial, right to notice of penal disciplinary consequences, right to counsel, right to confront witnesses and present evidence, and rights to jury trial, an impartial judicial forum, and appellate review.

Whether characterized as a "liberty" interest (Board of Regents v. Roth, 408 U.S. 564, 572 (1972)) or a "property" interest (Perry v. Sindermann, 408 U.S. 593, 601 (1972)), there is no question that a license to practice one's profession is entitled to broad constitutional protection.

Disciplinary proceedings are adversary proceedings of a quasi-criminal nature. In re Ruffalo, 390 U.S. 544, 551 (1968). As a matter of constitutional law, an attorney subject to a disciplinary proceeding is entitled to due process of law. Id. at 550; Schware v. Board of Examiners, 353 U.S. 232, 238-39 (1956) ("A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Four-

teenth Amendment.") This Court has reaffirmed the same principle repeatedly for thirty years. See, Willner v. Committee on Character and Fitness, 373 U.S. 96, 102 (1963); In re Ruffalo, 390 U.S. 544, 550 (1968); Baird v. Arizona, 401 U.S. 1, 8 (1971); In Re Snyder, 472 U.S. 634 (1985). See also, Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991).

Due process includes notice of the charge and an opportunity to be heard and defend. Willner, supra, 373 U.S. at 105. Under New York law, as well, due process requires a hearing. See, e.g., Matter of Rowe, 73 N.Y.2d 336, 339 (1989) (subsequent appellate history omitted). And see, New York Judiciary Law §90(4)(h).

In New York, a lawyer has no defense on the merits in a "serious crime"

disciplinary proceeding because the serious crime "conviction" forecloses relitigation of the factual issues in the disciplinary proceeding. Yet the lawyer in the summary contempt situation has not been accorded the due process protection afforded in the context of the usual criminal charge resulting in a criminal conviction. See, New York Judiciary Law §755. Accordingly, due process protections are entirely absent from a "serious crime" disciplinary proceeding premised on a summary contempt adjudication.[7]

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[7] The premise of the disciplinary proceeding brought against petitioner is that summary contempt is a "serious crime" for disciplinary purposes. However, as shown by extensive analysis submitted to the New York courts, a summary contempt adjudication is not a crime, no less a "serious crime." Even if it were deemed a "serious crime," however, a summary contempt adjudication is totally different in nature and qual-

(continued...)

As this Court recently noted, "[s]ummary adjudication becomes less justifiable once a court leaves the realm of immediately sanctioned, petty direct contempts." United Mine Workers v. Bagwell, ___ U.S. ___, 129 L.Ed. 2d 642, 655 (1994). In this case, summary adjudications of contempt have been taken well beyond the exigencies of an

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[7](...continued)
ity from criminal acts as they are generally understood. A summary contempt adjudication involves a judge's on-the-spot ruling about a lawyer's speech and/or conduct during a court proceeding -- generally, as in this matter, in circumstances where the lawyer's instinctive reaction as to what is necessary in representation of a client in the context of hotly-contested criminal trials conflicts with the court's view of what is necessary and proper. Those summary contempt circumstances bear no relationship to criminal convictions, obtained with the protection of full due process rights, for the numerous criminal acts which are regularly considered in "serious crime" disciplinary proceedings and which generally involve dishonesty and moral turpitude.

ongoing judicial proceeding and extended into the disciplinary realm where, without more, they have been automatically redefined as professional misconduct resulting in the disciplinary penalty of suspension.

This issue previously received the Court's attention many years ago. The opinion of Justice Jackson, joined by Justices Black, Frankfurter and Douglas, for an evenly-split Supreme Court, in In re Isserman, 345 U.S. 286 (1952),[8] ad-

[8] In In re Isserman an attorney was disbarred in New Jersey on the ground that he had been found guilty of six charges of contempt when defending leaders of the communist party. An evenly-divided Supreme Court permitted him to be disbarred from practice in the Supreme Court. The Supreme Court subsequently amended its rule to provide that a disbarment shall not be ordered except on a concurrence of a majority of the participating justices. Thus, upon rehearing, Isserman's order for disbarment was set aside and the order to show cause discharged. In re Isserman, 348 U.S. 1 (1954).

dressed the question of whether an attorney is denied due process if he is disbarred on the basis of findings made in a summary proceeding convicting him of contempt:

> We think this Court should not accept for itself a doctrine that conviction of contempt per se is ground for a disbarment. ... The remedy for courtroom contempt should be prompt and direct punishment proportioned to the offense....
>
> We do not recall any previous instance, though not venturing to assert that there is one, where a lawyer has been disbarred by any court of the United States or of a state merely because he had been convicted of a contempt.

Id., 345 U.S. at 292. This due process question, presented by petitioner's case, is still open for determination as

a matter of federal constitutional law.[9]

Equal Protection: Respondent-appellant's suspension constitutes a denial of equal protection of the law.

In 1974, New York State Judiciary Law Section 90, governing the disciplin-

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[9] Isserman sought review of the New Jersey disbarment by the United States Supreme Court. Although certiorari was denied, two justices voted to grant on the ground that the New Jersey court denied due process by accepting the certificate of the trial judge without affording Isserman an opportunity to confront his accusers and present evidence to deny, explain or extenuate the charges against him. Isserman v. Ethics Committee, 345 U.S. 927 (1953).

Nine years after his disbarment in the State of New Jersey, Isserman applied for reinstatement to the bar. His application was granted, the New Jersey Supreme Court stating, inter alia, "in a disbarment proceeding based upon contempt, it is peculiarly appropriate to look behind the conviction to assay the conduct involved" which it agreed constituted, at most, "several unplanned contumacious outbursts during a long and bitter trial." In re Isserman, 35 N.J. 198, 202-203 (1961).

ing of attorneys, only provided for two classes of proceedings. Section 90(4) provided for automatic disbarment upon conviction of a felony. All other conduct required a hearing after formal charges. Judiciary Law, §90(6) - (10). In 1979, the Legislature added to Section 90 of the Judiciary Law a class of disciplinary proceedings labelled "serious crimes." Laws of 1979, Chapter 674. In adding new subdivision (4)(d), supra, p. 3-4, the Legislature largely adopted Rule 691.7(b) of the Appellate Division, Second Department Rules (supra, p. 4-5). However, the Legislature significantly omitted from the new statute all reference to "criminal contempt of court." Indeed, contempt of court, does not appear in the statutory list of "serious crimes".

Judiciary Law §90 is the statute which empowers the Appellate Division to discipline an attorney who has committed a "serious crime". That statute defines the limit of that term and of the Appellate Division's power in that regard.

Petitioner's "serious crime" disciplinary charge, proceeding and punishment under the Second Department rule violated his federal constitutional equal protection and due process rights.

Moreover, a comparison of the conflicting Rules of the four New York State Appellate Divisions shows that Mr. Giampa has been selectively prosecuted in the Second Department. The rules of the Third and Fourth Department are totally in conflict with the Second

Department.[10] The Third Department, by specific reference to the list in Judiciary Law §90(4)(d), excludes criminal contempt and, of course, summary contempt. NYCRR §806.7. The Fourth Department also defines "serious crimes" without mention of criminal contempt, to say nothing of summary contempt. NYCRR §1022.21(b). Research has not disclosed any published disciplinary Third or Fourth Department decisions based on

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[10] Although First Department Rule 603.12(b), contains the same language as the Second Department rule, the disciplinary results are much less clearly established. At least in Matter of Hochheiser, unpublished Order of the Appellate Division, First Department, April 22, 1994, cited below with attorney Hochheiser's permission, that court dismissed the "serious crime" petition although it referred to a prior order (a summary contempt adjudication by a federal judge) determining respondent to have been convicted of "serious crime" (70a-74a).

summary contempt adjudication "serious crime" charges.

Thus, petitioner, as an attorney in the Second Department, was subjected to summary and punitive discipline for summary contempt adjudications when attorneys in at least the Third and Fourth Departments are not subject to any such summary contempt "serious crime" judicial rule or charge or prosecution. These circumstances constitute a classic violation of constitutional rights to equal protection, as well as due process, of law.

Selective prosecution in the enforcement of the law violates constitutional guarantees of equal protection. While the exercise of prosecutorial discretion in and of itself may not violate equal protection, it does if abused on the basis of arbitrary and

improper classification or for improper purpose. A criminal prosecution selectively instituted purposefully to quash exercise of First Amendment rights, for example, constitutes a denial of equal protection. See, e.g., U.S. v. Moss, 604 F.2d 569 (8th Cir. 1979); U.S. v. Blitstein, 626 F.2d 774 (10th Cir. 1980); cert. denied, 449 U.S. 1102 (1981). And see, Esmail v. Macrane, 53 F.3d 176 (7th Cir. 1995) (section 1983 action alleging campaign of official harassment directed at plaintiff out of vindictiveness; addressing equal protection claim, Court of Appeals, per Judge Posner, stated: "A class of one is likely to be the most vulnerable of all, and we do not understand therefore why it should be denied the protection of the equal protection clause.").

Petitioner contended below that the applicable disciplinary statute and rule were unconstitutionally applied to him and that he was improperly singled out from others to be characterized as a misdemeanant and suspended from practice. These circumstances raise questions of equal protection of the law which should be determined by this Court.

First Amendment: Petitioner's suspension and the related proceedings also implicate the First Amendment of the United States Constitution. The suspension improperly subjected petitioner to severe discipline on the basis of words spoken in the course of providing his clients a defense to criminal charges. In the proceedings below, the mere fact that certain words were spoken was held automatically to consti-

tute and sustain charges of professional misconduct.

A lawyer should and must be allowed to speak freely and frankly when urging a position before a judge and making a record in a criminal case. If in doing so he risks summary contempt because his words offend some in the judiciary, that risk, however distressing to the lawyer, may be necessary to properly represent the client. That known and related risk is an altogether different proposition from the unknown and unrelated threat of suspension and/or disbarment -- particularly when the subsequent disciplinary proceeding involves summary disposition of the professional misconduct charges.

The free speech issue raised in this case is intertwined (as has been contended in all proceedings below) with criminal defendants' constitutional

right to counsel and lawyers' professional obligations to zealously represent their clients.

CONCLUSION

For the reasons stated above, the writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner

Cynthia Rollings
Of Counsel

September 1995

APPENDIX

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-ninth day of June 1995

PRESENT, HON. JUDITH S. KAYE. Chief Judge, presiding.

2-25 Mo. No. 809
In the Matter of Richard L. Giampa, an attorney and counselor-at-law.

Grievance Committee for the Ninth Judicial District,
Respondent;
Richard L. Giampa,
Appellant.

The appellant having filed notice of appeal and a motion for leave to appeal to the Court of Appeals and for a stay in the above cause, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, on the Court's own motion, that the appeal be and the same

hereby is dismissed, without costs, upon the ground that no substantial constitutional question is directly involved; and it is

ORDERED, that the said motion for leave to appeal be and the same hereby is denied; and it is

ORDERED, that the said motion for a stay be and the same hereby is dismissed as academic.

/s/
Donald M. Sheraw
Clerk of the Court

STATE OF NEW YORK
COURT OF APPEALS

Donald M. Sheraw
Clerk of the Court

Clerk's Office
Albany, New York 12207

DECISION June 29, 1995

2-25 Mo. No. 809
In the Matter of Richard L. Giampa, an attorney and counselor-at-law.

Grievance Committee for the Ninth Judicial District,
Respondent;
Richard L. Giampa,
Appellant.

On the Court's own motion, appeal dismissed, without costs, upon the ground that no substantial constitutional question is directly involved. Motion for leave to appeal denied. Motion for a stay dismissed as academic.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

7957q
S/jv

AD2d

GUY JAMES MANGANO, P.J.
LAWRENCE J. BRACKEN
THOMAS R. SULLIVAN
VINCENT R. BALLETTA, JR.
ALBERT M. ROSENBLATT, JJ.

OPINION & ORDER

92-02638

In the Matter of Richard L. Giampa,
an attorney and counselor-at-law.

Grievance Committee for the Ninth
Judicial District, petitioner;
Richard L. Giampa, respondent.

DISCIPLINARY proceeding instituted by the Grievance Committee for the Ninth Judicial District. The respondent was admitted to the Bar on February 25, 1976, at a term of the Appellate Division of the

Supreme Court in the Second Judicial Department. By order of this court dated June 15, 1993, that branch of the petitioner's motion as sought to suspend the respondent upon his summary adjudication of criminal contempt by Justice Leslie Crocker Snyder on December 15, 1992 was denied, the petitioner was authorized to file and serve a supplemental petition, and the issues raised by the petition and supplemental petition were referred to the Hon. Moses M. Weinstein, as Special Referee to hear and report (replacing Kingdon Locker, Esq.).

Gary L. Casella, White Plains, N.Y. (Etta M. Biloon and Faith Lorenzo of counsel), for petitioner.

Beldock, Levine & Hoffman, New York, N.Y. (Myron Beldock of counsel), for respondent.

PER CURIAM. In this proceeding,

the Special Referee sustained Charges One, Two, Three, Four, Six, Seven, Eight, Nine, and Ten and failed to sustain Charge Five and that portion of Charge Seven as relates to Charge Five. The petitioner now moves to confirm the report of the Special Referee, in part, vis-a-vis the charges sustained, and to disaffirm to the extent of the charges which were not sustained by the Special Referee. The respondent cross-moves to confirm in part and disaffirm in part.

Charge One alleged that the respondent was convicted of a serious crime within the meaning of 22 NYCRR 691.7(b). By order dated November 8, 1985, the Hon. Daniel P. Fitzgerald, Justice of the Supreme Court, New York County, adjudged the respondent to be in criminal contempt of

court, an unclassified misdemeanor, based upon his willful disobedience of a lawful order of the court and a course of willful, unlawful, and contumacious behavior in the presence of the court during the case of *People v Everett Curry*.

Charge Two alleged that the respondent engaged in conduct prejudicial to the administration of justice in violation of DR 1-102(A)(5) and conduct that reflects adversely on his fitness to practice law in violation of DR 1-102(A)(7) (now DR 1-102[A][8]), based on the conduct set forth in Charge One.

Charge Three alleged that the respondent was convicted of a serious crime within the meaning of 22 NYCRR 691.7(b). In or about May 1982, the Hon. George D. Covington, Justice of the Supreme Court,

Bronx County, adjudged the respondent to be in criminal contempt of court, an unclassified misdemeanor, based upon his willful, unlawful,,[sic] and contumacious behavior in the presence of the court during the case of *People v Luis Soto*.

Charge Four alleged that the respondent engaged in conduct prejudicial to the administration of justice in violation of DR 1-102(A)(5) and conduct that adversely reflects on his fitness to practice law in violation of DR 1-102(A)(7) (now DR 1-102[A][8]), based on the conduct set forth in Charge Three.

Charge Five alleged that the respondent engaged in conduct prejudicial to the administration of justice in violation of DR 1-102(A)(5) and conduct that adversely reflects on his fitness to practice law in

violation of DR 1-102(A)(7) (now DR 1-102 [A][8]). During the course of the criminal trial *People v Francisco Torres a/k/a Alfredo Maldonado,* the Honorable Gerald Sheindlin, Justice of the Supreme Court, Bronx County, adjudged the respondent to be in criminal contempt of court.

By decision dated April 16, 1990, Justice Sheindlin reiterated his finding of contempt and awarded the respondent only $1,200 towards a requested fee of $3,927.50, upon the ground that the respondent had engaged in a pattern of contemptuous behavior during the course of the trial. By Notice of Petition and Petition dated August 3, 1990, the respondent commenced a CPLR article 78 proceeding to review the fee award. By decision and order dated November 14, 1991, the

Appellate Division, First Judicial Department, unanimously dismissed the respondent's petition. The respondent's motion for leave to appeal to the Court of Appeals was denied by order dated February 18, 1992.

Charge Six alleged that the respondent engaged in conduct prejudicial to the administration of justice in violation of DR 1-102(A)(5) and conduct adversely reflecting on his fitness to practice law in violation of DR 1-102(A)(7) (now DR 1-102[A][8]) during the course of his representation of Gerald Miller, who was being tried in the Supreme Court, Queens County before the Hon. John Leahy. During pretrial hearings in 1988, the respondent engaged in such conduct as accusing Judge Leahy of bias, of prosecuting the case

more vigorously than the prosecutor, of making up facts, and of making a "bogus decision".

During the course of the trial in *People v Gerald Miller*, respondent engaged in *ad hominem* attacks on the judge's personal integrity and in disruptive courtroom behavior.

Charge Seven alleged that the respondent engaged in undignified and discourteous conduct which is degrading to a tribunal in violation of DR 7-106(c)(6) based on the allegations set forth in Charges One, Three, Five, and Six.

Charge Eight alleged that the respondent was convicted of a serious crime within the meaning of 22 NYCRR 691.7(b). By order dated December 15, 1992, the Hon. Leslie Crocker Snyder, Justice of the

Supreme Court, New York County, adjudged the respondent to be in criminal contempt of court, an unclassified misdemeanor, for intentionally, knowingly, and willfully engaging in disorderly, contemptuous, and insolent behavior, in the immediate view and presence of the court during the case of *People v Raphael Martinez*.

Charge Nine alleged that the respondent engaged in conduct prejudicial to the administration of justice in violation of DR 1-102(a)(5) and conduct that adversely reflects on his fitness to practice law in violation of DR 1-102(A)(7) (now DR 1-102[A][8]), based on the factual allegations set forth in Charge Eight.

Charge Ten alleged that the respondent engaged in undignified and discourteous conduct which is degrading to a tribu-

nal in violation of DR 7-106(c)(6) based on the allegations set forth in Charge Eight.

Based on the voluminous evidence adduced, we find that all ten charges of professional misconduct against the respondent have been established by a fair preponderance of the credible evidence and should have been sustained. Accordingly, the petitioner's motion to confirm in part and disaffirm in part is granted and the respondent's cross-motion is denied in its entirety.

In determining an appropriate measure of discipline to impose, the respondent asks the court to consider that the charges against him arise from an attorney's actions in furtherance of his client's interests, as opposed to acts of negli-

gence or other attorney misconduct which are, by definition, not in furtherance of the client's interest. The respondent has also submitted numerous letters from Judges before whom he has appeared as an advocate, from practicing attorneys with whom he has come in contact, and from personal acquaintances, all attesting to his skill and vigor as an advocate, his diligence and his devotion to clients. The respondent's disciplinary history is previously unblemished.

The respondent appears to have overlooked the fact that all attorneys, including criminal defense attorneys, are bound by the Lawyers' Code of Professional Responsibility and the disciplinary rules. The respondent's conduct in the five separate cases which are the subject matter of

this disciplinary proceeding went beyond the bounds of zealous advocacy. Throughout these transcripts, the respondent has evinced a flagrant disrespect for the judiciary and a fundamental disregard for the judicial process which he has been sworn to uphold. Far from expressing genuine remorse for his disrespectful conduct, the respondent has consistently sought to justify his improper conduct by blaming the Judges before whom he was trying cases.

Under the circumstances, the respondent is suspended from the practice of law for a period of one year.

MANGANO, P.J., BRACKEN, SULLIVAN, BALLETTA and ROSENBLATT, JJ., concur.

ORDERED that the petitioner's motion to confirm, in part, and disaffirm, in part, the report of the Special Referee is granted; and it is further,

ORDERED that the respondent's cross-motion to confirm, in part, and disaffirm, in part, is denied in its entirety; and it is further,

ORDERED that the respondent, Richard L. Giampa, is suspended from the practice of law for a period of one year, commencing July 1, 1995 and continuing until the further order of this court, with leave to the respondent to apply for reinstatement no sooner than six months prior to the expiration of the said period of one year upon furnishing satisfactory proof (a) that during the said period he refrained from practicing or attempting to practice law, (b) that he has fully complied with this order and with the terms and provisions of the written rules governing the conduct of disbarred, suspended, and resigned attorneys (22 NYCRR 691.10), and (c) that he has otherwise properly conducted himself; and it is further,

ORDERED that pursuant to Judiciary Law § 90, during the period of suspension and until the further order of this court, the respondent, Richard L. Giampa, is commanded to desist and refrain (1) from practicing law in any form, either as principal or agent, clerk or employee of another, (2) from appearing as an attorney

or counselor-at-law before any court, Judge, Justice, board, commission or other public authority, (3) from giving to another an opinion as to the law or its application or any advice in relation thereto, and (4) from holding himself out in any way as an attorney and counselor-at-law.

ENTER:

/s/
Martin H. Brownstein
Clerk

SUPREME COURT, STATE OF NEW YORK
APPELLATE DIVISION, SECOND DEPT.

I, MARTIN H. BROWNSTEIN, Clerk of the Appellate Division of the Supreme Court, Second Judicial Department, do hereby certify that I have compared this copy with the original filed in my office on May 22, 1995 and that this copy is a correct transcription of said original.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of the Court on May 22, 1995.

/s/ Martin H. Brownstein

Report of Special Referee
Moses M. Weinstein
dated May 18, 1994

(pages 1-20)

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

----------x

In the Matter of Richard L. Giampa,
an attorney and counselor-at-law,

GRIEVANCE COMMITTEE FOR THE NINTH
JUDICIAL DISTRICT,

Petitioner,

-against-

RICHARD L. GIAMPA,

Respondent.

----------x

REPORT OF MOSES M. WEINSTEIN, SPECIAL
REFEREE, No. 92-02638

TO THE JUSTICES OF THE SUPREME COURT,
APPELLATE DIVISION, SECOND DEPARTMENT

MOSES M. WEINSTEIN
Referee
123-35A 82nd Road
Kew Gardens, NY 11415
(718) 544-3344

INTRODUCTION

By Order of the Supreme Court, Appel-

late Division, Second Department, dated July 2, 1992, this proceeding was instituted by the Grievance Committee for the Ninth Judicial District with respect to Richard L. Giampa, an attorney and counselor at law, admitted to practice by this court on February 25, 1976. The Petitioner prayed that the Respondent be disciplined for professional misconduct upon the charges therein set forth.

The proceeding came before the Court by Notice of Petition dated December 15, 1992, and by Supplemental Petition dated January 26, 1993. The Respondent filed a verified Answer dated November 13, 1992 and a supplemental verified Answer dated June 25, 1993.

By Order dated June 15, 1993, the issues raised herein were referred to me, a retired Justice of the Supreme Court,

Appellate Division, Second Department, to hear and report with my findings upon each of the issues.

Hearings were held by me on September 20, 1993; October 8, 1993; November 22, 1993; December 3, 1993; December 9, 1993; and December 10, 1993. In due course, post hearing memoranda and replies were submitted by Petitioner and Respondent.

The Petitioner was represented by the office of Gary L. Casella, Esq., Chief Counsel, Grievance Committee for the Ninth Judicial District, by Etta M. Biloon, Esq., Deputy Counsel, of 399 Knollwood Road, White Plains, NY 10603. The Respondent, Richard L. Giampa, was represented by Beldock, Levine & Hoffman, Esqs., Myron Beldock, of counsel, with offices at 99 Park Avenue, New York, NY.

The Petitioner called witnesses and

submitted twelve (12) exhibits into evidence. The Respondent called witnesses and testified himself. He submitted ten (10) exhibits.

CHARGE ONE

Respondent, Richard L. Giampa, has been convicted of a "serious crime" within the meaning of Section 90(4)(d) of the New York State Judiciary Law and Section 691.7(b) of the Rules Governing the Conduct of attorneys within this judicial department (22 N.Y.C.R.R. Section 691.7[b]) as follows:

1. By Order dated November 8, 1985, Honorable Daniel P. Fitzgerald, Justice of the Supreme Court, New York County, adjudged the Respondent to be in criminal contempt of court, an unclassified misdemeanor, based upon his willful disobedience to a lawful order of the Court and a course of willful, unlawful and contumacious behavior in the presence of the court during the case of

People vs. Everett Curry.

CHARGE TWO

Respondent, Richard L. Giampa, has been guilty of engaging in conduct prejudicial to the administration of justice in violation of Disciplinary Rule 1-102(A)(7) and conduct that adversely reflects on his fitness to practice law in violation of Disciplinary Rule 1-102(A)(7) [formerly 1-102(A)(6)] as follows:

1. The factual allegations contained in Charge One are repeated and realleged as if set forth more fully herein.

CHARGE THREE

Respondent, Richard L. Giampa, has been convicted of a "serious crime" within the meaning of Section 90(4)(d) of the New York State Judiciary Law and Section 691.7(b) of the Rules Governing the Con-

duct of attorneys within this judicial department (22 N.Y.C.R.R. Section 691.7[b]) as follows:

1. In or about May of 1982, Honorable George D. Covington, Justice of the Supreme Court, Bronx County, adjudged the Respondent to be in criminal contempt of court, an unclassified misdemeanor, based upon his willful, unlawful and contumacious behavior in the presence of the court during the case of People vs. Luis Soto.

CHARGE FOUR

Respondent, Richard L. Giampa, has been guilty of engaging in conduct prejudicial to the administration of justice in violation of Disciplinary Rule 1-102(A)(5) and conduct that adversely reflects on his fitness to practice law in violation of Disciplinary Rule 1-102(A)(7) [formerly 1-102(A)(6)] as follows:

1. The factual allegations contained in Charge Three are re-

peated and realleged as if set forth more fully herein.

CHARGE FIVE

Respondent, Richard L. Giampa, has been guilty of engaging in conduct prejudicial to the administration of justice in violation of Disciplinary Rule 1-102(A)(5) and conduct that adversely reflects on his fitness to practice law in violation of Disciplinary Rule 1-102(A)(7) [formerly 1-102(A)(6)] as follows:

1. During the course of a trial in the matter of Francisco Torres a/k/a Alfredo Maldonado, Honorable Gerald Sheindlin, Justice of the Supreme Court, Bronx County, adjudged the Respondent to be in criminal contempt of court.

2. By decision dated April 16, 1990, Justice Sheindlin reiterated his finding of contempt and awarded the Respondent only $1,200 towards a requested fee of $3,927.50 upon the ground that the Respondent had engaged in a pattern of contemptuous

behavior during the course of the trial.

3. By Notice of Petition and Petition dated August 3, 1990, the Respondent brought on an Article 78 proceeding to declare the decision unlawful.

4. By decision and order dated November 14, 1991, the Appellate Division, First Department, unanimously dismissed the petition.

5. The Respondent sought leave to appeal to the Court of Appeals and that application was denied by order dated February 18, 1992.

CHARGE SIX

Respondent, Richard L. Giampa, has been guilty of engaging in conduct prejudicial to the administration of justice in violation of Disciplinary Rule 1-102(A)(5) and conduct that adversely reflects on his fitness to practice law in violation of Disciplinary Rule 1-102(A)(7) [formerly 1-102(A)(6)] as follows:

1. During the course of pre-trial hearings in the matter of People vs. Gerald Miller in 1988, the Respondent engaged in conduct including:
   a. accusing the Judge presiding, Hon. John Leahy of bias;
   b. accusing the Judge presiding of "prosecuting the case more vigorously than the prosecutor;
   c. accusing the Judge presiding of making upon facts;
   d. accusing the Judge presiding of making a "bogus decision."

2. During the course of the trial in the matter of People v. Gerald Miller in 1989, the Respondent repeatedly ignored explicit directives of the Court, including the order to stop making speeches to the jury and sit down.

3. During the course of the trial in the matter of People v. Gerald Miller, the Respondent engaged in ad hominem attacks on the presiding Judge's personal integrity.

4. During the course of the trial in the matter of People v. Gerald Miller, the Respondent engaged in disruptive courtroom behavior.

CHARGE SEVEN

Respondent, Richard L. Giampa, has been guilty of engaging in undignified and discourteous conduct which is degrading to a tribunal in violation of Disciplinary Rule 7-106(C)(6) as follows:

1. The allegations contained in Charges One, Three, Five and Six are repeated and realleged as if set forth more fully herein.

SUPPLEMENTAL PETITION

Dated: January 26, 1993

CHARGE EIGHT

Respondent, Richard L. Giampa, has been convicted of a "serious crime" within the meaning of Section 90(4)(d) of the New York State Judiciary Law and Section 691.7(b) of the Rules Governing the Conduct of Attorneys within this Judicial Department [22 N.Y.C.R.R. Section 691.7(b)] as follows:

1. By order dated December 15, 1992, Honorable Leslie Crocker Snyder, Justice of the Supreme Court, New York County, adjudged Respondent to be in criminal contempt of court, an unclassified misdemeanor, for intentionally, knowingly and willfully engaging in disorderly, contemptuous and insolent behavior, in the immediate view and presence of the court during the case of People v. Raphael Martinez.

CHARGE NINE

Respondent, Richard L. Giampa, has been guilty of engaging in conduct prejudicial to the administration of justice in violation of Disciplinary Rule 1-102(a)(5) and conduct that adversely reflects on his fitness to practice law in violation of Disciplinary Rule 1-102(a)(7) [formerly 1-102(a)(6)] as follows:

1. The factual allegations contained in Charge Eight are repeated and realleged as if set forth more fully herein.

CHARGE TEN

Respondent, Richard L. Giampa, has been guilty of engaging in undignified and discourteous conduct which is degrading to a tribunal in violation of Disciplinary Rule 7-106(c)(6) as follows:

1. The allegations contained in Charge Eight are repeated and realleged as if set forth more

fully herein.

REPORT

At the hearing which was convened on Monday, September 20, 1993, the Petitioner formally withdrew references to Judiciary Law Section 90(4)(d) in the charges contained in the petition and supplemental petition and proceeded on Charges One, Three and Eight on the basis of 22 N.Y.C.R.R. Section 691.7(b).

At the same hearing, the presiding Referee advised the Respondent that he was precluded from relitigating the issues of his various contempts as set forth in the charges herein.

CHARGES ONE, TWO and SEVEN
OF THE PETITION

It has been alleged that the Respondent, Richard L. Giampa has been convicted of a "serious crime" in that he was ad-

judged to be in criminal contempt of the Court on November 8, 1985, by Hon. Daniel P. Fitzgerald, Justice of the Supreme Court, New York County, during the case of People vs. Everett Curry.

The Respondent's answer to the petition and supplemental petition specifically admitted the fact that he was held in contempt of the Court by Order of the Hon. Daniel P. Fitzgerald.

Since the foregoing allegation has been admitted by the Respondent and based upon the evidence presented before me, I find that the allegations of Charges One, Two and Seven of the Petition have been fully sustained and that the Respondent has been guilty of engaging in conduct prejudicial to the administration of justice within the meaning of Section 90(4)(d) of the New York State Judiciary

Law and Section 691.7(b) of the Rules Governing the Conduct of attorneys within this judicial department (22 N.Y.C.R.R. Section 691.7[b]); in violation of Disciplinary Rule 1-102(A)(5) and conduct that adversely reflects on his fitness to practice law in violation of Disciplinary Rule 1-102(A)(7) [formerly 1-102(A)(6)], and in violation of Disciplinary Rule 7-106(C)(6).

CHARGES THREE and FOUR
OF THE PETITION

It has been alleged that the Respondent, Richard L. Giampa has been convicted of a "serious crime" in that he was adjudged to be in criminal contempt of the Court in or about May, 1982, by Hon. George D. Covington, Justice of the Supreme Court, Bronx County, during the case of People vs. Luis Soto.

The Respondent's answer to the petition and supplemental petition specifically admitted the fact that he was held in contempt of the Court by Order of the Hon. George D. Covington.

Since the foregoing allegation has been admitted by the Respondent and based upon the evidence presented before me, I find that the allegations of Charges Three and Four of the Petition have been fully sustained and that the Respondent has been guilty of engaging in conduct prejudicial to the administration of justice within the meaning of Section 90(4)(d) of the New York State Judiciary Law and Section 691.7(b) of the Rules Governing the Conduct of attorneys within this judicial department (22 N.Y.C.R.R. Section 691.7[b]), and in violation of Disciplinary Rule 1-102(A)(5) and conduct that

adversely reflects on his fitness to practice law in violation of Disciplinary Rule 1-102(A)(7) [formerly 1-102(A)(6)].

CHARGE FIVE
OF THE PETITION

It has been alleged that the Respondent, Richard L. Giampa has been guilty of engaging in conduct prejudicial to the administration of justice in violation of Disciplinary Rule 1-102(A)(5) and conduct that adversely reflects on his fitness to practice law in violation of Disciplinary Rule 1-102(A)(7) [formerly 1-102(A)(6)] as follows:

1. During the course of a trial in the matter of Francisco Torres a/k/a Alfredo Maldonado, Honorable Gerald Sheindlin, Justice of the Supreme Court, Bronx County, adjudged that Respondent to be in criminal contempt of court.

The evidence discloses that the Re-

spondent had used the words "wild lunatic" to the Court and during this exchange between him and the Judge, the jury was not present.

After the luncheon recess, the Respondent apologized to the Court for using the words "wild lunatic". The Court then stated that the apology was accepted and the finding of contempt was expunged from the record.

Apparently, Justice Sheindlin had awarded the Respondent only $1,200.00, towards a requested fee of $3,927.50. This fee matter was dismissed by the Appellate Division on November 14, 1991, and leave to appeal to the Court of Appeals was denied by Order dated February 18, 1992.

Based upon the evidence presented before me, I find that the allegations of

Charge Five of the Petition have not been fully sustained.

CHARGES SIX and SEVEN
OF THE PETITION

It has been alleged that the Respondent, Richard L. Giampa has been guilty of engaging in conduct prejudicial to the administration of justice in that he was adjudged to be in criminal contempt of the Court in 1988, by Hon. John Leahy, Justice of the Supreme Court, Queens County, during the case of People vs. Gerald Miller.

The Respondent's answer to the petition and supplemental petition specifically admitted the fact that he was held in contempt of the Court by Order of the Hon. John Leahy.

Since the foregoing allegation has been admitted by the Respondent and based upon the evidence presented before me, I

find that the allegations of Charges Six and Seven of the Petition have been fully sustained and that the Respondent has been guilty of engaging in conduct prejudicial to the administration of justice in violation of Disciplinary Rule 1-102(A)(5) and conduct that adversely reflects on his fitness to practice law in violation of Disciplinary Rule 1-102(A)(7) [formerly 1-102(A)(6)], and in violation of Disciplinary Rule 7-106(C)(6).

CHARGES EIGHT, NINE and TEN
OF THE PETITION

It has been alleged that the Respondent, Richard L. Giampa has been convicted of a "serious crime" in that he was adjudged to be in criminal contempt of the Court in December 15, 1992, by Hon. Leslie Crocker Snyder, Justice of the Supreme Court, New York, during the case of People

vs. Raphael Martinez.

The Respondent's answer to the petition and supplemental petition specifically admitted the fact that he was held in contempt of the Court by Order of the Hon. Leslie Crocker Snyder.

Since the foregoing allegation has been admitted by the Respondent and based upon the evidence presented before me, I find that the allegations of Charges Eight, Nine and Ten of the Petition have been fully sustained and that the Respondent has been guilty of engaging in conduct prejudicial to the administration of justice within the meaning of Section 90(4)(d) of the New York State Judiciary Law and Section 691.7(b) of the Rules Governing the Conduct of attorneys within this judicial department (22 N.Y.C.R.R. Section 691.7[b]); violation of Disciplin-

ary Rule 1-102(A)(5) and conduct that adversely reflects on his fitness to practice law in violation of Disciplinary Rule 1-102(A)(7) [formerly 1-102(A)(6)], and in violation of Disciplinary Rule 7-106(C)(6).

RESPONDENT

The Respondent, Richard L. Giampa testified in his own behalf that he is 45 years old, married and has two children. He grew up in Valley Stream, New York, where he attended high school and was president of his class and involved in wrestling. He was also involved in activities at the University of Connecticut, from which he graduated in 1970. He attended the Cumberland School of Law in Birmingham, Alabama and graduated in 1975. During law school, he was a law clerk for

the firm of Harris and Esdale. He was admitted to practice law in New York in February of 1976. He became employed in New York as an Assistant District Attorney in the Bronx County District Attorney's Office.

He left the District Attorney's Office in May of 1980 and went into private practice with a partner. He was on the 18(b) panel and the CJA panel. He tried between six and ten cases a year. He handled mostly criminal work as well as some personal injury matters and some appeals. He has handled cases in numerous counties throughout New York as well as in other states and is admitted to the Supreme Court of the United States. He became a solo practitioner about three and a half years after leaving the District Attorney's Office. Since the mid-1980's,

he has been handling more specialized criminal cases such as A-1 drug felonies, homicides, rapes and RICO offenses. In the last several years, he has been handling long, hotly contested cases which have drawn media attention. He has maintained his office in Peekskill, New York, since 1983 or 1984. He has been involved in a number of bar associations over the years. He devotes his personal time to his two children. He trains his own horses and has raised and bred canines. He is active in the organizations in which his children are involved.

In addition thereto, the Respondent made a statement at a hearing to the Court in the minutes of December 10, 1993 (See minutes pages 573-579) wherein he stated as follows:

"This is an enormous dilemma I

find myself in. My family has suffered, I have suffered, my practice has suffered, and I accept responsibility for the conditions which have brought me here.

I deeply regret having acrimony with any judge, and I will make every effort if in the future there appears to be controversy, and not to make any effort to escalate, or to make very effort not to escalate a situation which would deprive the system and my client of a fair trial."

In addition thereto, the following character witnesses testified with respect to the Respondent:

Joseph Callouri, Chairman of the Amicus Curiae Committee of the New York

State Association of Criminal Defense Lawyers;

Arthur Henriksen, Esq., former Assistant District Attorney;

Solomon H. Kaplan, Esq.;

Honorable Lawrence J. Finnegan, Jr., Supreme Court Justice; and

David Lewis, President of the New York Association of Criminal Defense Lawyers.

The Respondent also submitted numerous letters from Supreme Court Justices and other public officials attesting to his character and reputation. These are herewith annexed and made part of this report.

CONCLUSION

Respondent does not dispute that he was convicted of criminal contempt. In-

stead, he contends that it does not constitute a "serious crime" under the Rules of the Appellate Division. This contention flies directly in the face of Section 691.7(b) of the Rules of the Appellate Division, Second Judicial Department, which provide:

> [t]he term "serious crime" shall include any felony, not resulting in automatic disbarment under the provisions of subdivision (4) of Section 90 of the Judiciary Law, and any lesser crime a necessary element of which, as determined by the statutory or common law definition of such crime, involves interference with the administration of justice, criminal contempt of court, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, an attempt or a conspiracy of solicitation, of another to commit a "serious crime" or a crime involving moral turpitude. (emphasis added)

The Second Department has consistently treated summary contempts as "serious crimes" warranting discipline. Matter of

Sassower, 125 AD2d 52 (2nd Dept. 1987), Matter of Leeds, 87 AD2d 96 (2nd Dept. 1982).

CANON 7

A Lawyer Should Represent a Client Zealously Within the Bounds of the Law

ETHICAL CONSIDERATION

EC 7-1. The duty of a lawyer both to his client and to the legal system, is to represent his client zealously within the bounds of the law, which includes Disciplinary Rules and enforceable professional regulations. The professional responsibility of a lawyer derives from his membership in a profession which as the duty of assisting members of the public to secure and protect available legal rights and benefits. In our government of laws and not of men, each member of our society

is entitled to have his conduct judged and regulated in accordance with the law, to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue or defense.

"A Judge has the power and the duty to preserve the integrity of the Judicial System, and to that end may regulate the conduct of attorneys in his courtroom (Matter of Peck v. Stone, 32 A.D.2d 506, 508, 304 N.Y.S.2d 881). This power includes the authority to determine whether an attorney has run afoul of the code of professional responsibility (Matter of Erlanger, 20 N.Y.2d 778, 284 N.Y.S.2d 84, 230 N.E.2d 727; Young v. Oak Crest Park, 75 A.D.2d 956, 428 N.Y.S.2d 69)" See People v. Gans, Cite as 466 N.Y.S.2d 911.

"[1] It is clear from our discussion that we do not construe the duty of lawyers to zealously safeguard the rights of their clients to confer upon them the unbridled prerogative to trespass upon the orderly functioning of the courts or upon the rights of others (see Code of Professional Responsibility Canons EC 7-1, EC 7-4; 7 C.J.S., Attorney and Client, 53)". See Karutz v. Chicago Title Insurance, 451 New York Supplement, 1001.

It seems therefore that insults to a presiding justice during the cause of a trial erodes the respect for the Judicial System in our society.

I find that the charges against the Respondent as set forth in Charges One through Ten inclusive, with the exception

of Charge Five, have been sustained.

Dated: Kew Gardens, New York
May 18, 1994

Respectfully submitted,

/s/
MOSES M. WEINSTEIN

WEINSTEIN & WEINSTEIN

May 31, 1994

Hon. Donna Sosna
Appellate Division
2nd Department
45 Monroe Place
Brooklyn, NY 11201

Re: Matter of Richard L. Giampa
No. 92-02638

Dear Donna:

In accordance with our conversation, I have prepared the enclosed pages 17, 18, 19 and 20, which should be substituted in place of the same pages originally enclosed in the report dated May 18, 1994.

Please advise if that is satisfactory.

Sincerely,

WEINSTEIN & WEINSTEIN

/s/
MOSES M. WEINSTEIN

MMW:mad
Enc.

RECEIVED
Jun 2 10 26 AM '94
APPELLATE DIVISION
SECOND DEPARTMENT

Apparently, Justice Sheindlin had awarded the Respondent only $1,200.00, towards a requested fee of $3,927.50. This fee matter was dismissed by the Appellate Division on November 14, 1991, and leave to appeal to the Court of Appeals was denied by Order dated February 18, 1992.

Based upon the evidence presented before me, I find that the allegations of Charge Five of the Petition have not been fully sustained.

CHARGES SIX and SEVEN
OF THE PETITION

It has been alleged that the Respondent, Richard L. Giampa has been guilty of engaging in conduct prejudicial to the administration of justice in violation of Disciplinary Rule 1-102(A)(5) and conduct that adversely reflects on his fitness to

practice law in violation of Disciplinary Rule 1-102(A)(7) [formerly 1-102(A)(6)] as follows:

1. During the course of pre-trial hearings in the matter of People vs. Gerald Miller in 1988, the Respondent engaged in conduct including:
   a. accusing the Judge presiding, Hon. John Leahy, of bias;
   b. accusing the Judge presiding of "prosecuting the case more vigorously than the prosecutor";
   c. accusing the Judge presiding of making upon facts;
   d. accusing the Judge presiding of making a "bogus decision."

2. During the course of the trial in the matter of People v. Gerald Miller in 1989, the Respondent repeatedly ignored explicit directives of the Court, including the order to stop making speeches to the jury and sit down.

3. During the course of the trial in the matter of People v. Gerald Miller, the Respondent engaged in ad hominem attacks on the presiding Judge's personal integrity.

4. During the course of the trial in the matter of People v. Gerald Miller, the Respondent engaged in disruptive courtroom behavior.

The Respondent's answer to the petition and supplemental petition specifically admitted these facts.

Since the foregoing allegation has been admitted by the Respondent and based upon the evidence presented before me, I find that the allegations of Charges Six and Seven of the Petition have been fully sustained and that the Respondent has been guilty of engaging in conduct prejudicial to the administration of justice in violation of Disciplinary Rule 1-102(A)(5) and conduct that adversely reflects on his fitness to practice law in violation of Disciplinary Rule 1-102(A)(7) [formerly 1-102(A)(6)], and in violation of Disciplin-

ary Rule 7-106(C)(6).

CHARGES EIGHT, NINE and TEN
OF THE PETITION

It has been alleged that the Respondent, Richard L. Giampa has been convicted of a "serious crime" in that he was adjudged to be in criminal contempt of the Court in December 15, 1992, by Hon. Leslie Crocker Snyder, Justice of the Supreme Court, New York, during the case of People vs. Raphael Martinez.

The Respondent's answer to the petition and supplemental petition specifically admitted the fact that he was held in contempt of the Court by Order of the Hon. Leslie Crocker Snyder.

Since the foregoing allegation has been admitted by the Respondent and based upon the evidence presented before me, I find that the allegations of Charges

Eight, Nine and Ten of the Petition have been fully sustained and that the Respondent has been guilty of engaging in conduct prejudicial to the administration of justice within the meaning of Section 90(4)(d) of the New York State Judiciary Law and Section 691.7(b) of the Rules Governing the Conduct of attorneys within this judicial department (22 N.Y.C.R.R. Section 691.7[b]); violation of Disciplinary Rule 1-102(A)(5) and conduct that adversely reflects on his fitness to practice law in violation of Disciplinary Rule 1-102(A)(7) [formerly 1-102(A)(6)], and in violation of Disciplinary Rule 7-106(C)(6).

SEPTEMBER 20, 1993 TRANSCRIPT OF SPECIAL REFEREE HEARING

(Extract from pp. 69-77)

THE REFEREE: I take it now, Ms. Biloon, that the petitioner rests.

MS. BILOON: That is correct, your Honor.

THE REFEREE: And the usual motions that are made by Mr. Beldock on behalf of the respondent, which we have discussed both on and off the record, are denied.

MR. BELDOCK: Can I state them in detail, Judge?

THE REFEREE: I have no objection if you want to.

MR. BELDOCK: I want to.

I think this is an usual [sic - should read "unusual"] case and an unusual set of charges. I want to first direct myself to the charges that are based sole-

ly on serious crime allegation; those are the ones I want to direct myself to first.

Those charges, if I have got the numbers right, are One through Four of the petition, and Eight through Ten of the supplemental petition. To an extent I suppose they are also involved in Charge Seven, but let us pass that for a moment. They may not be.

MS. BILOON: The serious crime charges are One, Three and Eight.

MR. BELDOCK: I see it differently, and that is why I want to bring it to your attention, Judge. Let me use One and Two as an example, so you will understand why I say the serious crime charges are One through Four and Eight through Ten.

Charge One of the petition simply cites the November 8, 1985 order of Judge Fitzgerald adjudging the respondent to be in criminal contempt. The language is all

conclusory.

Charge Two of the petition, which does not use the words "serious crime," for purposes of making the charge, relies solely on the alleged "factual allegations contained in Charge One." They are thereby repeated and realleged.

That is true as to Charges Three and Four, and they have the same sentence, and that is true as to Charges Eight through Ten of the supplemental petition.

So all of those charges allege one fact and only one fact, that Mr. Giampa was found guilty of a summary contempt; Mr. Giampa was found to have been in summary contempt, was therefore convicted of a serious crime, and therefore these charges should be sustained. That is basically what they allege.

Now I assert to you that those charges have to be dismissed as a matter of

law. I do this very briefly because it is set forth in my letter to the Court and in our briefs before the Appellate Division.

THE REFEREE: Do you include Eight also?

MR. BELDOCK: Eight through Ten. They have the same format.

THE REFEREE: That is right. That is why I called your attention to it.

MS. BILOON: Isn't it correct that he would have to make motions to dismiss any charges to the petition to the Appellate Division? That is my understanding of these procedures here, your Honor.

THE REFEREE: I would agree, but he is now saying that they are invalid charges, and I am assuming that motions to dismiss are only contentions, and that these charges are not serious crimes. I will permit him to do that.

MS. BILOON: It would seem to me he

would have to make a motion to the Appellate Division to dismiss these charges. With all due respect, you are to hear and report and not to rule on.

THE REFEREE: Whatever his contentions they are not serious crimes, and therefore should not be held as such by me.

MR. BELDOCK: Whether they be thought of as "serious" or "crime" or "serious crime" in some other context, the summary contempt findings cannot and should not be treated as - quote, unquote - "serious crimes," within the meaning of the Judiciary Law and the regulations that have been filed.

MS. BILOON: We have withdrawn the Judiciary Law.

MR. BELDOCK: Ms. Biloon, with all due respect, let me unburden myself of these few thoughts.

THE REFEREE: The reason I permitted that to happen is because there has been a previous case, People against Leeds in which the Referee held that the respondent was guilty of a serious crime. So on the basis of that, I am permitting him to make his motions, and then I will make a ruling.

MR. BELDOCK: The reasons have already been set forth at length in the papers. However, the withdrawal of the Judiciary Law, Section 90 adds another reason. You do not have authorization, in my opinion, to proceed under a regulation. The regulation is either properly passed pursuant to Judiciary Law or it has no power at all, and we are now in a very strange situation with the withdrawal of the Section 90, Judge.

THE REFEREE: That is why I suggested you wait with your motion until such time

as you had an opportunity to review and read the withdrawal made by Ms. Biloon on behalf of the petitioner. However, you elected to go forward, so I will rule on them now.

MR. BELDOCK: If you can reserve your decision, I still think I should make the argument now.

THE REFEREE: Well, I will rule on your motion now and I will tell you the ruling now, that I will deny it, but I will give you an opportunity to renew your motion later on, perhaps at the close of the case or at some time before then. So it will give me an opportunity too to read the sections. That is why I said I want it in a letter.

MR. BELDOCK: I will incorporate all the arguments previously made and go on to the next aspect of my motion to dismiss those charges that are based solely on the

serious crime/summary contempt allegation because that is all that has been put before you as a basis.

I haven't read Petitioner's pretrial memorandum of law yet, but I see that she starts out with in point 2 citing the Matter of Levey, 37 NY 2d 279, 1975.

She is there arguing under the Matter of Levey that we cannot relitigate the issues underlying the summary contempt. That is absolutely wrong, I assert to you, and this is why.

This is not a collateral estoppel circumstance. This is not like a criminal conviction after a plea or a trial. The summary contempt has as its very nature a summary disposition, no due process protections in the ordinary sense. There are no counsel or usually there is no counsel. There was none here. There were no evidentiary findings, there was no

opportunity to bring witnesses in. There is no fair hearing; there is no neutral forum. There is no right to confront witnesses. There is nothing but summary disposition.

I have Matter of Levey in front of me, and this is a very unusual matter before your Honor. This Matter of Levey on its face does not apply because what it says as to why you have a collateral estoppel effect when you have a conviction of a criminal matter after trial or plea, and I will just read this - I am sure you know this case, but this case is so clearly based upon the fact that there were due process proceedings that led to the conviction of the lawyer so that he could not relitigate his criminal conviction literally - the headnote 3:

"It is not unreasonable or unfair to preclude an attorney from relitigating in

a disciplinary proceeding an issue when previously the same issue has been resolved against him in another proceeding to which he was a party in which the standard of proof called for the highest quantum beyond a reasonable doubt and in which rigorous safeguards were imposed to insure against an unjust conviction."

That is the entire heading.

The case basically is grounded on the principle in our law that when you have - and this is also directly from the quote - due process and fairness in the underlying proceeding, then there is going to be collateral estoppel as to whether you can relitigate the underlying issue. That is simply not so here.

This is also, as you know, the most unusual case we have been able to find in our research where the Department has been taking the position that its summary con-

tempt/serious crime dichotomy, whatever the right word is, would automatically result in the suspension of a lawyer from his --

MS. BILOON: Your Honor --

THE REFEREE: There is no such ruling to the best of my knowledge, that the serious crime automatically results in the suspension of the lawyer. You have told that to me.

MR. BELDOCK: That has been the position of the Second Department's Grievance Committee in this matter.

THE REFEREE: I doubt that.

MS. BILOON: The motion was made to suspend him, but it was denied by the Court and we are proceeding on that basis.

MR. BELDOCK: That has been their contention, and I don't just throw that in. That is an emphasis that is significant in the mix, but the point I am argu-

ing now, even if the Referee finds that these charges must proceed to a hearing based on the manner in which they are presently formulated, that is the charges I have cited which are based on a serious crime formulation, the Grievance Committee should not be allowed to make its case by merely presenting, as they have, the summary contempt findings.

These circumstances do not, as a conviction after trial, allow for a collateral estoppel approach. The Committee should have made an evidentiary showing of some kind beyond the bare summary contempt findings. Its failure to do so should cause the charges to be dismissed.

THE REFEREE: That is your application.

MR. BELDOCK: Yes, sir.

THE REFEREE: Your application is denied with leave to renew at a subsequent

hearing if you so desire.

MR. BELDOCK: There are a few other subapplications and then I will be through.

THE REFEREE: Go ahead.

MR. BELDOCK: I think I should add to my last application that I am not only moving to dismiss, but I am moving for you to make an evidentiary ruling that there is not a collateral estoppel effect arising from these summary convictions.

THE REFEREE: Denied.

(Extract from pp. 80-81)

MR. BELDOCK: Judge, if I may say just one more thing, I clearly understand your finding that you are not here to be an appellate court as to whether or not a contempt finding was properly made, and I am excluding Judge Sheindlin, as to wheth-

er or not such a contempt finding was made. It is made. It is on the record in that sense, and I agree with you that certainly in the instances of the Curry matter, for example, or the present state of whichever other one - the names now escape me, there are so many proceedings we are doing here - but that is not what I am trying to say to your Honor.

I am trying to say that qualitatively you have the duty and the right, given the fact that the Matter of Levey does not apply because they are not the same circumstances, to make your own qualitative findings about underlying conduct and the context.

No one has ever made such a review because it is a summary contempt, and I think that you should keep that issue in the air.

You are making that ruling now, and I

understand that you can change your mind in some sense later on, but you are making that ruling as if the question were only whether or not you can overturn a summary contempt. That is not what I am arguing before your Honor. I am arguing that you have the right and the power to look at the underlying facts without a collateral estoppel effect.

MS. BILOON: I believe you have already ruled on that.

MR. BELDOCK: Maybe it is an issue that is unusual enough, but anyhow I ask you for the opportunity to put some more laws before your Honor.

THE REFEREE: You have the opportunity, as I told you before, at any time during this proceeding to make such motions that you see fit with reference to these rulings.

OCTOBER 8, 1993
SPECIAL REFEREE HEARING

(Extract from pp. 121-122)

THE REFEREE: Let me make something very clear to you for about the umpteenth time. If there were reasons justifying your client in making whatever statements he did, which caused him to be held in contempt, your rights and obligations were to appeal to the Appellate Division, not to me. I don't have the power to review.

If you are using that to show that it was in mitigation of what he did, well, I may hear that if you want to expound the reasons or the statements that caused him to put himself in a position where a judge held him in contempt. But I don't have the power to review a ruling of a Justice of the Supreme Court who held him in contempt. I don't have that authority or power.

UNPUBLISHED UNPUBLISHED

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on April 22, 1994.

Present - Hon. Francis T. Murphy,
Presiding Justice
John Carro
Ernst H. Rosenberger
Milton L. Williams
Peter Tom, Justices.

FILED
Apr 22 1994
Appellate Division,
Supreme Court
First Department

M-7903
M-4

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In the Matter of Lawrence Hochheiser, an attorney and counselor-at-law:

Departmental Disciplinary Committee for the First Judicial Department,

Petitioner,

Lawrence Hochheiser, Esq.,

Respondent.

----------X

An unpublished order of this Court

having been made and entered on January 30, 1991 (M-3801), granting petitioner's motion determining that the offense for which respondent Lawrence Hochheiser, who was admitted to practice as an attorney and counselor-at-law in the State of New York on December 12, 1966, at a Term of the Appellate Division of the Supreme Court, First Judicial Department, was convicted was a "serious crime" pursuant to Judiciary Law §90(4)(d) and 22 NYCRR §603.12(a) of the Rules of this Court, and directing respondent to show cause why a final order of suspension, censure or removal from office should not be made,

And petitioner having moved for an order confirming the Majority report of its Hearing Panel recommending that the matter be remanded to the Committee Chair for the issuance of a private reprimand;

and respondent having cross-moved for an order confirming the Minority report of the Hearing Panel recommending that the "serious crime" petition be dismissed,

Now upon reading and filing the papers with respect to the motion; and due deliberation having been had thereon,

It is unanimously ordered that petitioner's motion to confirm the Majority Report seeking a private reprimand be and the same hereby is denied, the cross-motion seeking to confirm the Minority Report is granted, and the proceeding is hereby dismissed.

ENTER:

/s/ Catherine O'Hagan Wolfe

APPELLATE DIVISION SUPREME COURT FIRST DEPARTMENT
STATE OF NEW YORK

CATHERINE O'HAGAN WOLFE, Clerk of the Appellate Division of the Supreme Court First Judicial Department do hereby certify that I have compared this copy with, etc.

NOVEMBER 22, 1993 TRANSCRIPT
OF SPECIAL REFEREE HEARING

Events of 1988 Trial
Testimony of Richard L. Giampa

(Extract from pp. 202-207)

Q Let us start again. What efforts had you made prior to August 21, 1989 in regard to Judge Leahy and this case and the question of whether or not he should sit on this case?

A I had made an application to the Appellate Division. I don't know the exact date of it, and I don't know if it was prior to this date.

The letter you referred me to was a request for a special prosecutor, which I made to the Governor through John J. Poklemba, who at that time I believe was Director of Criminal Justice in the State of New York.

THE REFEREE: You were asked

whether or not you had made any application as to this Judge Leahy, and now you tell me that you made a request to have a special prosecutor appointed?

THE WITNESS: That is correct. I also made an application to the Appellate Division and made an application to Judge Leahy to have him recuse himself. The exact date of that I don't know. I believe my counsel has a copy of that application.

MR. BELDOCK: We have papers here and I will mark them.

THE REFEREE: Will you let your client testify. You are interrupting him when he is answering the question. Let him finish.

THE WITNESS: I had finished. I said if I can see a copy of that application, I can give you that date.

THE REFEREE: In any event, you made an application to Judge Leahy.

THE WITNESS: I believe that was in August of 1989.

Q I have a copy here of an order to show cause dated August 3, 1989 with an affirmation attached. Is this the document to which you refer (handing to witness)?

A Yes.

MR. BELDOCK: I ask that it be marked as an exhibit.

THE WITNESS: Filed August 3, 1989.

THE REFEREE: Are you offering that in evidence?

MR. BELDOCK: Yes, I am.

MS. BILOON: I am just noting for the record that this is not a certified copy of these documents. However, I

have no objection to them being introduced in evidence, this particular item.

(An order to show cause was received in evidence and marked Respondent's Exhibit C.)

THE REFEREE: The Court has received Respondent's Exhibit C, which purports to be an order to show cause by Mr. Giampa in the Appellate Division to have Judge Leahy recuse himself.

Q The first subheading of Charge Six states in summary that you ar being charged with certain professional misconduct for having accused the judge presiding, Hon. John Leahy, of bias.

Did you accuse the judge of bias in relation to your motion to recuse himself?

A Yes, I believe that he was biased in the case. I felt he was unfit to

sit as a judge in this particular matter.

Q Did you have reason, based upon your experience with the Judge up to an including August of 1989, to make that accusation?

MS. BILOON: Objection as to the form of the question.

THE REFEREE: Experience with reference to this case?

MR. BELDOCK: Yes.

THE REFEREE: I will allow it. Go ahead.

A Yes.

Q What were the reasons, and please in answering give factual recitals of what had occurred, if anything, in the course of this proceeding in that regard, and if necessary explain the procedural status of the case.

A The gravamen of my motion to the

Appellate Division dealt with the relationship of the witness, the major witness, in the Mastrangelo hearing, to the Judge's son, who was an Assistant District Attorney in the Bronx District Attorney's office as Deputy Bureau Chief of the Investigations Bureau or Rackets Bureau. It was one and the same. I don't know whether they entitled it the Rackets Bureau then. I think it was called Investigations Bureau at that time.

The main witness in the Mastrangelo hearing was an individual named Bridgett. He was a confidential informant with the Bronx District Attorney's office.

He had testified that he had cooperated with the Bronx District Attorney's office in two homicides of which I believe he said that he was a

witness, and had provided them with confidential information.

This witness was the witness in the Mastrangelo hearing which testified to facts that were involving whether or not my client, Gerald Miller, authorized and contracted him to kill the identifying witness in his homicide case that would testify against him.

In fact, the identifying witness had recanted his testimony at this point, but that is the understanding at the time, that the person was allegedly a witness against my client.

Q Mr. Giampa, I think it would help for you to give us an outline of what the case was about.

THE REFEREE: It is clear in his affidavit, which I received as Exhibit C; he gives his reasons, and one of the main

reasons seems to be he felt Judge Leahy should not be in the case for another reason, because his son was a Deputy Assistant in Bronx County where many of these things were taking place.

THE WITNESS: Yes, it was where many of them were taking place, but in fact this witness was a witness for the Investigations Bureau.

THE REFEREE: I understand that.

THE WITNESS: Of which his son was a Deputy Assistant District Attorney. He was under the supervision of --

THE REFEREE: I understand that, Mr. Giampa.

* * * *

(Extract from p. 212)

THE WITNESS: It didn't seem to me possible that the Judge - and certainly the appearance of impropriety was clear -

and it didn't seem to me possible that the Judge could sit impartially on a fact situation of which his son would benefit or not benefit professionally.

* * * *

(Extract from pp. 221-226)

Q Now would you continue to state any other reasons that come to mind as to why you believed and asserted that the Judge was biased?

A The Judge failed to turn over to me Brady material.

Q Please explain that. That is a conclusion.

MS. BILOON: Objection.

THE REFEREE: Objection overruled. I will permit it. Go ahead.

Q Please explain what you are talking about.

A Kevin Anderson was the identify-

ing witness --

THE REFEREE: Is that part of the affidavit which you have marked for identification, your application known as Respondent's Exhibit D for identification? Isn't that the application you made to the Appellate Division in which you suggested that Judge Leahy had not --

MS. BILOON: It is Exhibit C, Judge. That is the one where he asked Judge Leahy to recuse himself.

THE REFEREE: The Court stands corrected. Respondent's Exhibit C in evidence, in which you made an application to the Appellate Division, in which you stated that Judge Leahy had refused to allow reports to be turned over to you.

MR. BELDOCK: I am not sure it is stated there in that manner, and this is a different aspect. It is not a ques-

tion of his --

THE REFEREE: Let me read you the exhibit:

"Kevin Anderson had previously testified during a Wade hearing in September 1988 that the defendant was not the shooter of his brother. He had misidentified him because the police had suggested to him that the defendant was his brother's killer. Eddie Anderson, father of the deceased and the eye witness, testified at the Wade hearing, confirming virtually everything his son Kevin had testified to."

And then you went on to page 4, paragraph 9, in which you said:

"All of these reports have not been allowed in evidence. To date virtually hundreds of important, relevant questions during examination have been object-

ed to by the prosecution and sustained by Jude Leahy."

THE WITNESS: No, that is not what I was referring to.

MR. BELDOCK: We are referring to a specific different incident having to do with the Judge himself.

THE REFEREE: Go ahead.

THE WITNESS: Kevin Anderson was the identifying witness to his brother's, Melvin Anderson's, murder. Kevin Anderson had originally picked a photograph of Gerald Miller out. Subsequent to that, Kevin Anderson recanted his identification to the prosecutor, and on numerous occasions Kevin Anderson, along with his father, Eddie Anderson, had told the prosecutor that he had identified the wrong man, and that he should be released from prison.

Gerald Miller was the man he had identified that had been in jail for a prolonged period of time at this stage. We were trying to make application to the Court to get him released or to have some bail set, but at this juncture it was to no avail.

The prosecutor never informed me that Kevin Anderson had spoken to him and recanted his testimony. Kevin Anderson became upset with the prosecutor and realized that the prosecutor was not going to rectify this wrong, this mistake. So he went to speak to Charles Lamar, who was the investigator in the Gerald Miller case. He was Gerald Miller's investigator and also working along with me to defend Gerald Miller.

He was advised then to go to a lawyer and to speak to that lawyer and

tell the lawyer what was happening. He went to Arthur Henriksen.

MS. BILOON: Your Honor, I have to object to all this with Kevin Anderson.

MR. BELDOCK: This is essential to explain what happened.

THE REFEREE: I will overrule you. I am being as patient as humanly possible with all this tale and story although frankly I don't see what that has to do at all with the charge made against Mr. Giampa.

THE WITNESS: Arthur Henriksen took an affidavit, a statement from Kevin Anderson. After taking a statement, I believe he brought Kevin Anderson to court. In any event, he took that statement and filed one copy with the District Attorney's office and I believe Assistant District Attorney Quinn, and he sent the

other copy to Justice Leahy recanting the fact that Kevin Anderson had made a mistake, had gone to the prosecutor, and in fact nothing was being done, and the person he identified, Gerald Miller, in jail was not guilty of the charge he was charged with.

He sent a copy of that statement along with a letter to Judge Leahy. I was unaware of that for many months. I found out a statement was made, and I requested from Mr. Henriksen a copy of the statement, which he refused to give me.

I found out at the Wade hearing that a copy of that letter was sent to the Judge. That was months after the letter had been sent. That was during a period of time when we were bringing applications in the Appellate Division for reduction in Mr. Miller's bail.

I was never informed by the Judge that such a letter was sent to him. I was never informed by the prosecutor that such a letter was sent to him, and that the witness had an affidavit that had completely recanted his identification of my client.

I was aware of the fact that the witness was trying to do something and had gone to the prosecutor, but I was never aware of the fact that such an affidavit existed with the Judge, and the Judge never turned that over to me.

* * * *

(Extract from p. 227)

Q Continue.

A That clearly led me to believe that the Judge didn't have the interests of justice in mind in determining this case. He had evidence based upon Mr.

Henriksen's testimony which would clearly exculpate my client. He was aware of the fact that my client was in jail. He was aware of the fact that we were presenting applications to the Appellate Division to try to get a reduction in the bail because the prosecutor was not ready to go to trial.

* * * *

(Extract from p. 231)

A In the Judge's decision, page 6, the Judge stated: "Not only does the father of the witness refuse to produce the witness, but if called, the witness, Kevin Anderson, is expected to repudiate his Grand Jury testimony."

The finding that the father refused to produce the witness is totally and completely erroneous. There was no testimony that that occurred. There was

no testimony that he would in any way attempt not to produce the witness.

There was only testimony that he would make the witness available, and the statements of the prosecutor were consistent with that.

* * * *

(Extract from p. 245)

Q In the scheme of things with this trial, how would you explain the significance of the Mastrangelo hearing and the Court's decision?

A It was the entire case. If the Court did not perpetuate the eye witness' testimony, there was no case against my client for trial, and it was the entire case.

If he did not grant the request of the prosecutor to read the Grand Jury minutes to the jury, the prosecutor would

have had to dismiss their case. There was no case at all other than the eye witness.

* * * *

DECEMBER 3, 1993 TRANSCRIPT OF SPECIAL REFEREE HEARING

Events of 1988 Trial
Testimony of Arthur Henriksen

(Extract from pp. 419-420)

Q With respect to this letter of March 31, you say that you sent both the letter and the enclosures to Mr. Quinn?

A Yes.

Q You also indicated you sent carbon copies to Judge Leahy, Kevin Anderson and Eddie Anderson. Did you send copies of the statements to Mr. Quinn?

A Yes, I did.

Q Did you send the originals to Mr. Quinn?

A No, I have the originals right here.

Q Are you certain that you sent copies to Judge Leahy?

A Definitely.

Q Did you send copies to Eddie Anderson?

A Yes, I did. I sent it to them.

Q Copies of the statements as well?

A Yes, because they directed me to do this, and I had a letter and their statement and I gave them a copy.

* * * *

(Extract from pp. 420-421)

Q Mr. Henriksen, you said on cross that the statement taken from Kevin Anderson was in your handwriting?

A Correct.

Q Is that also true of Respondent's Exhibit J, the statement from Eddie Anderson?

A Yes

Q You actually wrote this?

A That is mine.

Q And it was signed by?

A The respective parties.

Q Was this statement from Eddie Anderson, Exhibit J, sent to Mr. Quinn and to the Judge at the same time as you sent Kevin Anderson's statement?

A Correct, yes.

* * * *

DECEMBER 9, 1993 TRANSCRIPT
OF SPECIAL REFEREE HEARING

Events of 1992 Trial
Testimony of Richard L. Giampa

(Extract from pp. 477-479)

Q Who was the next witness to take the stand?

A Robin McCabe.

Q Who was she?

MS. BILOON: Objection.

THE REFEREE: I will allow it.

A She was an Assistant District Attorney in New York County.

Q Please continue. She is on the stand?

A I believe that that is the witness that took a report from the previous witness. Direct examination begins. Mr. Camacho begins to ask her preliminary questions. At that point in time the Judge turns in my direction, Mr. Kulcsar

is sitting next to me at the counsel table.

Q The defense counsel table?

A The defense counsel table, which is to the right side of the courtroom and the Judge smirks at me, she kind of grins, what I perceive to be, at me.

The Judge had just previously, just moments ago, criticized me in a tirade saying that I was smirking. The Judge now turns and makes this facial gesture.

I say to Mr. Kulcsar: "She is smirking at me."

MS. BILOON: Objection. That is not in the record.

THE WITNESS: It is in the record, not that time I say it, but I then put on the record what I said to Mr. Kulcsar.

Q I don't mean to interrupt you, but trace the record. At the time that the Judge is making a facial gesture, according to your testimony, what was she saying if anything?

A She says to Mr. Kulcsar and myself:

"Please, excuse me. Would you like to hear this?"

Mr. Kulcsar says: "Yes, I would."

And I say: "I am asking you not to smirk at me."

I say that not in a loud voice at all, in a very matter of fact way; I want to put on the record, I want to get on the record that the Judge is in fact smirking at me. She has just gone on a very long criticism of me about smirking. I want to put on the record the Judge's

facial gesture in front of the jury to me.

* * * *

(Extract from pp. 481-482)

Q What size courtroom is this, what shape?

A It is a rectangle. It is short in width and it is long. In other words, the jury is at one end --

Q You sit at counsel table at which end?

A I sit all the way on the righthand side of the counsel table, furthest from the jury.

Q And the jury was at your left?

A All the way on the lefthand side near the windows. I am the furthest attorney to the right, right next to the Clerk's desk. The only one to my right would be the Clerk that sits there.

Q When you made the remark to the

Court, "I am asking you not to smirk at me," did you make it in the location you just described?

A Yes, I did. I made it from the position of being at the counsel table.

Q And in which direction were you looking when you made the remarks?

A Directly at the Judge and in very modest tone.

* * * *

(Extract from pp. 486-487)

Q Mr. Giampa, one of the exhibits that was submitted in this case of course is Jude Snyder's December 15, 1992 order, petition and contempt summary and mandate of commitment. In that document, I am reading just the relevant part, the Court said that you "did, after numerous warnings issued throughout these proceedings, shout at the Judge in a loud and abrasive

manner during the direct examination of a witness being conducted by an adversary." "I am asking you not to smirk at me." At that point in the order of Judge Snyder there is a footnote in which she states: "The words actually shouted were 'Stop smirking at me.' But this is not reflected in the minutes."

First of all, Mr. Giampa, the minutes as we all know stated that you used these words, "I am asking you not to smirk at me."

Is your recollection that the record is correct or incorrect?

MS. BILOON: Objection, your Honor.

THE REFEREE: I will allow it. I am very interested in your answer.

A The record is correct.

* * * *

DECEMBER 10, 1993 TRANSCRIPT OF SPECIAL REFEREE HEARING

Events of 1992 Trial
Testimony of Robert N. Schwartz

(Extract from pp. 569-571)

MR. BELDOCK: Before we get to Mr. Giampa, with the permission of Referee Weinstein and consent of Grievance Committee Counsel, I am going to state a stipulation as to what the testimony would be in substance of Robert N. Schwartz if he were called here to testify today under oath.

* * * *

Mr. Schwartz was admitted to practice in New York in 1951. He was the attorney for a man named Gonzalez, who was a co-defendant of Mr. Giampa's client Martinez in the case before Justice Snyder on December 15, 1992, the day that Justice

Snyder held him in contempt.

Mr. Schwartz would testify that at that time he was in the courtroom sitting close to the jury, and he did not hear Mr. Giampa speak in a loud voice, that testimony being in regard to the statement for which Judge Snyder held Mr. Giampa in contempt.

* * * *

No. 95-537 (2)

Supreme Court, U.S.
FILED
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In The

Supreme Court of The United States

October Term, 1995

RICHARD L. GIAMPA,

Petitioner,

- vs.-

GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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28 pgs

QUESTIONS PRESENTED

1. Is the due process clause violated when an attorney, after a disciplinary proceeding, is suspended for professional misconduct premised on four separate summary contempt adjudications, as well as his unethical actions in a fifth trial, and was collaterally estopped from re-litigating the merits of the underlying contempt adjucations at the disciplinary proceeding?

2. Is the equal protection clause violated when two of four existing New York State Appellate Courts have categorized criminal contempt as a serious crime and the other two Appellate Divisions have neither specifically designated criminal contempt to be a serious crime in their court rules nor have had the opportunity to decide whether criminal contempt would be considered a serious crime?

3. Are an attorney's contemptuous comments protected by the First Amendment?

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PRELIMINARY STATEMENT

This brief is submitted in opposition to the petitioner's application for a writ of certiorari to review an order of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, dated May 22, 1995 which sustained ten charges of professional misconduct and suspended the petitioner for one year. *Matter of Giampa*, 211 A.D.2d 212, (2d Dept. 1995). The Court of Appeals of the State of New York, by order dated June 29, 1995 dismissed petitioner's appeal as of right, upon the ground that the appeal presented no substantial constitutional question directly involved, and denied petitioner's alternative motion for leave to appeal. *Matter of Giampa*, No. 809 (Ct. App. June 29, 1995).

STATEMENT OF JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under Title 28 U.S.C Section 1257(a).

STATEMENT OF THE CASE

Ten charges alleging violations of various sections of the Code of Professional Responsibility were brought against petitioner. The charges were based upon four adjudications of summary criminal contempt, each an unclassified misdemeanor, as well as petitioner's unethical actions in a fifth matter. Punishment for one of the four adjudications was expunged.

The order of the New York State Appellate Division, Second Judicial Department dated May 22, 1995 does not touch upon the construction of either the New York or the United States Constitution. Rather, the Appellate Division merely found that the evidence presented at the disciplinary proceeding sustained the charges that petitioner had engaged in conduct prejudicial to the administration of justice in violation of DR 1-102(A)(5) of the New York Code of Professional Responsibility and conduct that reflected adversely on his fitness to practice law in violation of DR 1-102(A)(7) (now DR 1-102[A][8])(see 22 NYCRR 1200.3). In addition, the Appellate Division found that there was evidence to sustain the charges that petitioner was convicted of a serious crime within the meaning of 22 NYCRR 691.7(b).

Petitioner repeatedly engaged in willful, unlawful and contumacious behavior in the presence of the courts. The following statements represent examples of petitioner's conduct which lead to his contempt convictions. Petitioner was held in contempt by Acting Supreme Court Justice Sheindlin after consistently making sarcastic and derogatory remarks to the court such as:

> "I'm not infallible like your Honor;" "[T]he difference [between you and I] is Your Honor is not aware that he makes errors;" "Obviously the law is foreign to Your Honor in many respects." Petitioner accused the Judge of being a "wild lunatic," and stated to the Judge "your statement is an absolute lie." Petitioner also informed the bench that the Court's manner of conducting voir dire was "offensive," that a Court ruling was "unbecoming" and that the "Judicial Code also deals with judges."

Petitioner referred to New York State Supreme Court

Justice Covington as pompous, egotistical and lacking in legal ability. Petitioner further called the Court racist, and stated "You must be kidding," on several occasions. Petitioner accused Supreme Court Justice Leahy of being biased, making up facts, making a bogus decision, of living in a fantasy world and prosecuting the case more vigorously than the prosecutor.

Despite petitioner's contention to the contrary (Petitioner's Brief at 22), his disciplinary proceding was not a summary disciplinary proceeding. There were seven days of hearings at the disciplinary proceeding, amounting to five-hundred and eighty transcript pages in which petitioner was afforded the opportunity to be represented by counsel, and indeed had able counsel, and did testify and call witnesses on his behalf. Petitioner was properly collaterly estopped from relitigating the issue of his guilt, but he was permitted to produce evidence of the circumstances surrounding the contempt matters in explanation and mitigation. See *Matter of Levy*, 37 N.Y.2d 279 (1975). The exhibits received in evidence at the hearing included transcripts of the underlying trials where the misconduct occurred. In suspending petitioner, the Appellate Division, which had the benefit of the entire record to review, sustained all ten charges.

Thereafter, petitioner timely filed a notice of appeal and a motion for leave to appeal to the New York State Court of Appeals as well as an application for a stay in this matter. By order dated June 29, 1995, the New York State Court of Appeals denied all of petitioner's applications. *Matter of Giampa*, No. 809 (Ct. App. June 29, 1995).

REASONS FOR DENYING THE WRIT

I.

Jurisdiction on Writ of Certiorari is Not Warranted in this Matter.

Rule 10 of the United States Supreme Court Rules is entitled "Considerations Governing Review on Certiorari. The Rule states:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's descretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States

court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Although Rule 10 is not exhaustive, the facts of the instant matter do not relate to the "character of reasons" that his Court will consider for a petition for a writ of certiorari. The issues involved in this case do not reach the constitiutional dimensions to be addressed by the United States Supreme Court. Instead, petitioner is couching his argument in constitutional due process language, when, in effect, he is arguing that the Special Referee below erred by precluding petitioner from relitigation the underlying contempt adjudications. The Appellate Division, Second Department correctly determined that the claims raised by petititoner were meritless, and the New York State Court of Appeals in it's decision denying appeal as of right, stated that "no substantial constitutional question is directly involved". Because the decision is founded on well-established legal precedent, and since none of the arguments advanced by petitioner involve important questions of federal law that have not been, but should be, settled by this Court, further consideration of petitioner's claims by this Court is not warranted.

II.

Petitioner Has Been Afforded Due Process.

The question that must be asked is whether petitioner

was afforded due process both at the disciplinary proceeding and when he was summarily held in contempt. The answer is that petitioner was afforded due process in both instances.

An attorney who is the subject of a disciplinary proceeding which could potentially lead to his disbarment is entitled to procedural due process, including a fair notice of the charges and an opportunity to be heard. *In re Ruffalo*, 390 U.S. 544 (1968). It is well-settled that New York's statutory scheme concerning attorney disciplinary matters fully comports with federal constitutional guarantees of procedural due process. *Mildner v. Gulotta*, 405 F.Supp. 182 (E.D.N.Y. 1975), *aff'd*, 425 U.S. 901 (1975).

In the case at bar, petitioner had fair notice of the charges. He was served with a petition and supplemental petition containing ten separate charges of professional misconduct. The issues raised by the petition and answer were then referred by the Appellate Division, Second Judicial Department to a Special Referee "to hear and to report, together with his findings upon each of the issues."

Thereafter, petitioner, who was represented by counsel, was afforded a full evidentiary hearing and had the opportunity to produce witnesses and introduce documents into evidence on his own behalf. After the Referee rendered his Report, both sides submitted motions to the Appellate Division, Second Judicial Department which determined that the charges had been sustained. Thus, petitioner received his federal constitutional guarantees of procedural due process.

Likewise, petitioner's due process rights were not violated when he was summarily held in criminal contempt of court. First, in each instance in which respondent was held in contempt, he was warned by the courts that his conduct was improper, and he was given an opportunity to

make a statement in his defense or in extenuation of his conduct. See 22 N.Y.C.R.R. 701.2. Second, petitioner had the opportunity to appeal the court's ruling via a C.P.L.R. Article 78 proceeding. See C.P.L.R. 7801; Judiciary Law §755. Article 78 provides for a review of the record of the contempt proceeding, and provides an opportunity to supplement the record if necessary. C.P.L.R. §7804(h) even provides for the initiation of a full trial in certain circumstances. Petitioner obviously was aware of his opportunity to relitigate the merits of the contempt finding through an Article 78 proceeding as he sought to avail himself of this opportunity on two occassions. See *Giampa v. Sheindlin*, 177 A.D.2d 1066 (1st Dept. 1991) *lv denied* 79 N.Y.2d 754 (1992); *Giampa v. Snyder*, 199 A.D.2d 1094 (1st Dep't 1993) *lv denied* 83 N.Y.2d 761 (1994).[1] Whether or not petitioner availed himself of the full procedures provided by state law is irrelevant and does not constitute a sign of their inadequacy. Given both the in-court and subsequent opportunity to develop a factual record through the Article 78 proceeding, petitioner certainly had a full and fair opportunity to be heard. Thus, the Special Referee did not err by invoking the doctrine of collateral estoppel at the disciplinary hearing.

The gravamen of petitioner's argument is that because the Special Referee collaterally estopped petitioner from relitigating the merits of the underlying contempt adjudications at the disciplinary proceeding, he was denied due process. However, the Special Referee did not err by invoking the doctrine of collateral estoppel at the hearing,

---

[1] New York Courts have clearly demonstrated a willingness to reverse findings of contempt where the contemnor was not given an opportunity to be heard. See, *Rodrequez v. Feinberg*, 40 N.Y.2d 994 (19 76); *Singer v. Groh*, 99 A.D.2d 758 (2nd Dept. 1984).

when there was an identity of issues, and a full and fair opportunity to contest the decision now said to be controlling. See *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 102 S.Ct. 1883 (1992); *Ryan v. New York Tel. Co.*, 62 N.Y.2d 494 (1984). Indeed, the New York Court of Appeals held in the case of *Matter of Levy*, supra, that in a disciplinary proceeding based upon a conviction of a crime by an attorney, the attorney may not relitigate the issue of his guilt of the crime but may introduce competent evidence to explain or mitigate the significance of his criminal conviction. Accordingly, the Special Referee in this case properly allowed petitioner to introduce evidence of the circumstances surrounding the contempt matters in explanation and mitigation.

Petitioner distinguishes summary contempt adjudications from other criminal adjudications based on the fact "the lawyer in the summary contempt situation has not been accorded the due process protection afforded in the context of the usual criminal charge resulting in a criminal conviction." Petitioner concludes that "due process protections are entirely absent from a 'serious crime' disciplinary proceeding premised on a summary adjudication" (Petitioner's Brief at 25).

Admittedly, there are differences between summary contempt proceedings and other criminal proceedings. However, it does not follow that summary contempt adjudications deprive an attorney of the due process upon which to base a disciplinary proceeding for a serious crime.

One major difference between the summary contempt proceedings in this case and other criminal proceedings is that the misconduct which was the basis for petitioner's contempt convictions, occured in the direct presence of the Court. This Court has long recognized that direct contempts

that occur in the court's presence may be immediately adjudged and sanctioned summarily. In *Ex parte Terry*, 128 U.S. 289, 312, 9 S.Ct. 77, 32 L.Ed. 405 (1888), Justice Harlan, in his opinion, stated that where:

> The judicial eye witnessed the act, and the judicial mind comprehended all the circumstances of aggravation, provocation or mitigation; and, the fact being thus judicially established, it only remained for the judicial arm to inflict proper punishment.

This remains the general rule today. See, International Union, United Mine Workers of America v. Bagwell, 114 S.Ct. 2552 (1994). Furthermore, Rule 42 (a) of the Federal Rules of Criminal Procedure provide that "criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was commited in the actual presence of the court. Similarly, New York Judiciary Law §755 reqires that summary punishment may be invoked only "[w]here the offense is commited in the immediate view and presence of the court, or of the judge or referee, upon a trial or hearing..." When the judge's findings are coupled with the petitioner's opportunity to make a statement in court in his defense and his opportunity to appeal the judge's findings, it is clear that petitioner was given a full and fair opportunity to litigate the issue of his contempt.

Petitoner erroneously relies upon an exception that has been carved out of this general rule for serious criminal contempts in which a jury trial is required. See, *Bloom v. Illinois*, 391 U.S. 194, 209-210 (1968). In *Bloom*, this Court noted that many contempts are not serious crimes but petty offenses not within the jury trial provisions of the Constitution. The *Bloom* Court further stated that "when

serious punishment for contempt is contemplated, rejecting a demand for jury trial cannot be squared with the Constitution...". The *Bloom* Court reiterated the long standing principle that petty offenses need not be tried by a jury. In determining whether a criminal contempt falls within the category of petty offense or serious crime, the *Bloom* Court looked at the prescribed penalty imposed "as the best evidence of the seriousness of the offense." Id. at 209.

In support of his claim that criminal contempt should not be considered a serious crime, petitioner cites *Bloom v. Illinois*, supra. The *Bloom* Court noted that many criminal contempt convictions are petty offenses. Thus, petitioner takes issue with the fact that the New York courts have determined that an adjudication of summary criminal contempt constitutes a "serious crime" as defined by 22 N.Y.C.R.R. 691.7(b) See, *Matter of Leeds*, 87 A.D.2d 96 (2nd Dep't 1982); *Matter of Werlin*, 170 A.D.2d 77 (2nd Dep't 1991). Unlike the *Bloom* court which looked at the prescribed punishment to determine if a criminal contempt conviction is a serious crime which would require a trial by jury, New York Courts in the case at bar looked at the nature of the crime when determining whether a crime is considered a serious crime for the purposes of conducting a disciplinary proceeding. 22 N.Y.C.R.R. 691.7 states:

> (a) Upon the filing with this court of a certificate that an attorney has been convicted of a serious crime as hereinafter defined in a court of record of any State, territory or district, including this State, this court shall cause formal charges to be made and served upon the respondent and shall enter an order immediately referring the matter to a referee, justice or judge appointed by this court to conduct forthwith

> disciplinary proceedings, whether the conviction resulted from a plea of guilty or nolo contendre or from a verdict after trial or otherwise, and regardless of the pendency of an appeal.
>
> (b) The term "serious crime" shall include any felony, not resulting in automatic disbarment under the provisions of subdivision (4) of section 90 of the Judiciary Law, and any lesser crime a necessary element of which, as detemined by the statutory or common law definition of such crime, involves interference with the administration of justice, criminal contempt of court, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, an attempt or a conspiracy or solicitation of another to commit a "serious crime" or a crime involving moral turpitude.
>
> (c) A certificate of the conviction of an attorney for any crime shall be conclusive evidence of his guilt of that crime in any disciplinary proceeding instituted against him based on the conviction, and the attorney may not offer evidence inconsistent with the essential elements of the crime for which he was convicted as determined by the statute defining the crime.

Petitioner's argument intertwines and confuses the purpose of the separate and distinct definitions of serious crime and petty offense referred to in *Bloom* and in 22

N.Y.C.R.R. 691.7. In *Bloom* the Court was reviewing a contempt proceeding which is designed to "vindicate the authority of the court" See, *In re Isserman*, 9 N.J. 269 (1952). In this forum and for this purpose, the Court looked at the punishment prescribed to determine if a contempt adjudication is a serious crime. The applicable rule, 22 N.Y.C.R.R. 691.7, is designed to provide a proceeding to "deal with the fitness of the court's officer to continue in that office". For this purpose and in the disciplinary proceeeding forum the punishment prescribed is not a controlling factor in determining whether contempt is a serious crime.

Thus, when a judge summarily holds an attorney in criminal contempt without imposing a sentence in excess of a petty offense, a "full-blown trial" is unnecessary to preserve the attorney's right to due process. See, e.g. *United States v. Lumumba*, 794 F.2d 806, 814 (2nd Cir. 1986). In the case at bar, petitioner was not entitled to a full blown trial as summary adjudications of criminal contempt of court pursuant to Judiciary Law, Section 750, are punishable by a fine, not exceeding one thousand dollars, or by imprisonment, not exceeding thirty days (Judiciary Law, Section 751). For this reason, petitioner is incorrect in asserting that such proceedings give judges 'the unconstitutionally awesome power to strip an attorney of the right to practice whenever courtroom advocacy and conflict results in a summary contempt adjudication" (Petitioner's Brief at 21). The judges who held the petitioner in contempt were limited to the sanctions prescribed by Judiciary Law §750 and did not have the power to strip the petitioner of his license. Rather, petitioner was suspended by the justices of the Appellate Division, Second Department, a separate body, after being given the opportunity to be heard. It should be noted that the findings of the Special Referee are in no way binding on the Appellate Division, and the Appellate Division is under no obligation to suspend or disbar an

attorney who has been found guilty of contempt of court. Thus, the power and decision to discipline an attorney is greatly removed from the trial judge's authority.

In summary, petitioner's due process rights were not violated at either the contempt proceeding or at the disciplinary proceeding. Petitioner was given a full and fair opportunity to litigate his contempt and therefore, the Special Referee properly invoked the doctrine of collateral estoppel at the disciplinary hearing. To allow petitioner to relitigate the merits of his summary contempt adjudication at the disciplinary proceeding would undermine the doctrine of collateral estoppel and this cannot be tolerated.

III.

The Equal Protection Clause Has Not Been Violated.

Petitioner erroneously argues that his constitutional rights to due process and equal protection under the law have been violated because the rules of the Appellate Divisions for the Third and Fourth Judicial Departments of the State of New York do not specifically designate criminal contempt as a "serious crime", whereas the Appellate Divisions for the First and Second Judicial Departments have included criminal contempt of court in the category of serious crime.

It has been recognized that a special relationship exists between the attorney and the court which grants him a license to practice law before it. See, *Javits v. Stevens* , 382 F.Supp. 131 (S.D.N.Y. 1978); *Mildner v. Gulotta*, supra. These Courts further recognized that "no other body is as well qualified or as interested in determining whether an attorney is qualified to practice law." *Javits v. Stevens*, supra, 382 F. Supp. at 141.

Apparently, the legislature recognized the individual and special relationship which exists between attorneys and the courts in which they practice, as the legislature placed the responsibility for the discipline of attorneys and review of disciplinary proceedings in the hands of the courts. See Judiciary Law §90 (2). In giving the individual Departments the authority to discipline attorneys within their jurisdiction, the legislature seemingly recognized that reasons of policy regarded as significant in one Department in their effect on the conduct of attorneys may not prevail in another Department, because of differing conditions. Because the individual departments and individual courts may have different needs, the rules governing the conduct of attorneys licensed to practice law before those courts may vary.

Furthermore, simply because the Third and Fourth Departments do not specifically include contempt within the definition of "serious crime" does not mean that those Departments would not find criminal contempt to be within the meaning of "serious crime." The Judiciary Law § 90 (4)(d) and the Rules of the Third and Fourth Department include within the category of serious crime "any other crime a necessary element of which as determined by statutory or common law definition of such crime, includes interference with the adminstration of justice". Certainly, criminal contempt is a crime which interferes with the adminstration of justice. However, as petitioner notes (Petitioner's Brief at 32), "research has not disclosed any published disciplinary Third or Fourth Department decisions based on summary contempt adjudication 'serious crime' charges."[2]

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[2] Respondent's research disclosed only one case from the Fourth Department, *Matter of Stone*, 174 A.D.2d 1 (4th Dept. 1991) in which an attorney was suspended from the practice of law in New York based upon his consent to disbarment in Arizona. Harry Stone faced charges of contempt of court and other unprofessional conduct in Arizona. He

In any event, petitioner was held in contempt in the First and Second Departments and was admitted to practice law in the State of New York by the Appellate Division, Second Department. Both the First and Second Department Rules include criminal contempt in the category of serious crime. The Rules of all four Departments are published and promulgated, thus, putting petitioner on notice that he is required to follow the rules of the court in which he is practicing.

IV.

An Attorney's Contemptuous Statements Are Not Constitutionally Protected

As a member of a regulated profession and as an officer of the court, petitioner relinquished certain first amendment rights. As Justice Stewart noted in his concurring opinion in *In re Sawyer*, 360 U.S. 622, 646 (1959):

> A lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards.
>
> Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech.

---

waived a hearing in New York and presented only a petition in mitigation. The Fourth Department did not state whether or not the contempt of court was a serious crime when they suspended Harry Stone.

Certainly, petitioner had the right to argue vigorously for his clients. However, in making those arguments on behalf of his clients petitioner did not have the right to make the clearly contemptuous comments he made to the court during trial. As Justice Jackson stated in *Sacher v. United States*, 343 U.S. 1, 9 (1952):

> Of course, it is the right for every litigant to press his claim, even if it appears farfetched and untenable, to obtain the court's considered ruling. Full enjoyment of that right, with due allowance for the heat of controversy, will be protected by appellate courts when infringed by trial courts. But if the ruling is adverse, it is not counsel's right to resist it or to insult the judge--his right is only respectfully to preserve his point for appeal. During a trial, lawyers must speak, each in his own time and within his allowed time, and with relevance and moderation.

In the five trials which were the basis for petitioner's disciplinary proceeding, petitioner could not abide by the orders of the courts and did not limit his speech. Petitioner cannot "invoke the constitutional right of free speech to immunize himself from even-handed discipline for proven unethical conduct..." *In re Sawyer*, supra.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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